ORAL ARGUMENT SCHEDULED FOR APRIL 8, 2008

BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 07-1445

COMCAST CORPORATION

PETITIONER,

V.

FEDERAL COMMUNICATIONS COMMISSION
AND THE UNITED STATES OF AMERICA

RESPONDENTS.

ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a), the following is a statement of parties, *amici*, rulings under review, and related cases.

(A) Parties. The parties before the Federal Communications Commission in the proceeding on review were:

American Cable Association
Americans for Prosperity
Americans for Tax Reform
Armstrong Cable
Armstrong Utilities, Inc
Association of Public Television Stations
Atlantic Broadband Finance, LLC
Black Leadership Forum
Cable ONE, Inc.
Cisco Systems, Inc.
Comcast Corporation
Consumer Electronics Association
Council for Citizens Against Government Waste
Hewlett-Packard Company
Hispanic Federation
Hispanic National Bar Association
Hispanic Technology & Telecommunications Partnership
Institute for Liberty
Intel Corporation
League of Rural Voters
Chris Llana
Microsoft Corporation
Motorola, Inc.
National Cable & Telecommunications Association
National Black Chamber of Commerce
National Taxpayers Union
Pace Micro Technology PLC
Panasonic Corporation of North America
Pioneer North America, Inc.
RCN Corporation
Reason Foundation
Samsung Information Systems America, Inc.
Scientific Atlanta, Inc.
Sharp Electronics Corporation
Sony Electronics Inc.
Thomson
U.S. Hispanic Chamber of Commerce
The World Company d/b/a Sunflower Broadband

Except for *amicus curiae* Americans for Prosperity, Americans for Tax Reform, Citizens Against Government Waste, Hispanic Federation, The Institute for Liberty, League of Rural Voters, National Black Chamber of Commerce, and Reason Foundation, all parties, intervenors, and *amici* appearing in this court are listed in the Brief for Petitioner Comcast Corporation.

(B) Ruling Under Review. The Commission order under review is *Comcast Corporation Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules,* Memorandum Opinion and Order, 22 FCC Rcd 17113 (2007).

(C) Related Cases. The order on review has not previously been before this Court. Counsel are not aware of any related cases pending in this or any other Court.

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GLOSSARY

Br.	Brief
CE	Consumer electronics
CEA	Consumer Electronics Association
Comcast	Comcast Corporation
Commission (or FCC)	Federal Communications Commission
DBS	Direct broadcast satellite
DVR	Digital video recorder
HD	High definition
J.A.	Joint Appendix
MVPD	Multichannel video programming distributor
NCTA	National Cable & Telecommunications Association
STB	Set-top box

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BRIEF FOR RESPONDENTS

STATEMENT OF ISSUE

Following the congressional command that it "assure" the commercial availability of independently-manufactured video navigation devices to consumers, *see* 47 U.S.C. § 549(a), the Federal Communications Commission in 1998 prohibited cable operators from offering "integrated" cable set-top boxes ("STBs") that bundle both security (de-coding) and non-security (*e.g.*, channel selection) functions. The Commission did so to level the competitive playing field between cable companies, which have historically enjoyed a monopoly on all navigation devices, and independent manufacturers, which were not permitted to sell integrated devices. The cable industry challenged the Commission's authority to adopt the so-called "integration ban," but this

Court rejected that statutory challenge. *See General Instrument Corp. v. FCC*, 213 F.3d 724 (D.C. Cir. 2000) ("*General Instrument*"). When the Commission in 2005 declined to rescind the rule and set an implementation date of July 1, 2007, cable operators again asked this Court to set aside the integration ban – this time on the basis that it was arbitrary and capricious – but this effort failed as well. *See Charter Communications, Inc. v. FCC*, 460 F.3d 31 (D.C. Cir. 2006) ("*Charter*"). Nine years after the Commission first adopted the integration ban, the cable industry – represented by Comcast Corp., the nation's largest cable operator – now takes a third swing at the integration ban by challenging the Commission's decision not to waive it for millions of STBs. *Comcast Corporation Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, Memorandum Opinion and Order, 22 FCC Rcd 17113 (2007) ("*Order*") (J.A. 11).

This case presents the following issue for the Court's review:

Did the Commission act reasonably and consistently with the Communications Act when it denied Comcast's request for waiver of the integration ban for millions of STBs under each of the three waiver standards upon which Comcast relied?

JURISDICTION

The Commission issued the *Order* on review denying Comcast's petition for waiver of the agency's integration ban rule (47 C.F.R. § 76.1204(a)(1)) on September 4, 2007. 22 FCC Rcd 17113 (J.A. 11). The Commission had authority to act on Comcast's waiver petition pursuant to its general waiver authority under 47 U.S.C. §§ 151 & 154(i) and 47 C.F.R. §§ 1.3 & 76.7, and under the statutory waiver provision set out in section 629(c) of the Communications Act, 47 U.S.C. § 549(c). The Court has jurisdiction to review final orders of the Commission under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1).

STATUTES AND REGULATIONS

Pertinent statutes and regulations, in addition to those included in the petitioner's opening brief, are appended in the addendum to this brief.

COUNTERSTATEMENT

I. Statutory Framework

Cable television companies (referred to, along with other types of providers, as "multichannel video programming distributors" or "MVPDs") historically have provided to their customers (for a fee) the set-top converter boxes that translate video signals to a form usable by television sets. Until recently, all of these set-top boxes integrated two separate functions: a conditional access (security) function, which decodes encrypted signals to prevent unauthorized receipt of channels by non-paying customers; and a "navigation" function, which allows customers to select channels, view program guides, watch video-on-demand programming, record shows, and other such tasks. Because only cable operators could provide the security function – and because they refused physically to separate it from the navigation function – they effectively prevented unaffiliated consumer electronics ("CE") suppliers from offering competing navigation products. This limitation on consumer choice meant that subscribers were "locked in" to the navigation functions selected by the cable operator, with no options on price, quality, or features. *See generally Charter*, 460 F.3d at 34; *General Instrument*, 213 F.3d at 727-28. As a practical matter, this meant that millions of cable customers had no choice but to lease a standard black cable box from their cable company.

In 1996, Congress sought to remedy this monopoly situation by adding a new Communications Act provision that directed the Commission to "adopt regulations to assure the commercial availability to consumers * * * of converter boxes, interactive communications

equipment, and other equipment used by consumers to access multichannel video programming." 47 U.S.C. § 549(a). (Codified § 549 is commonly referred to as § 629 of the Communications Act, which we shall use throughout this brief.) Congress found competition to be "an important national goal" that would lead to "innovation, lower prices and higher quality," and it saw the adoption of Commission regulations as necessary to effect a "transition to competition in network navigation devices and other customer premises equipment." H.R. Rep. No. 104-204, at 112 (1995).

Section 629(c) includes a limited waiver provision directing the Commission to waive its set-top box regulation "for a limited time upon an appropriate showing * * * that such waiver is necessary to assist the development or introduction of a new or improved multichannel video programming or other service." 47 U.S.C. § 549(c).[1] That provision leaves undisturbed the Commission's general authority to waive its rules in appropriate circumstances. *See, e.g.,* 47 C.F.R. § 1.3 (stating that "[a]ny provision of the rules may be waived by the Commission * * * if good cause therefore is shown"); 47 C.F.R. § 76.7(a)(1) (stating that "the Commission may waive any provision of this part 76," which includes the rules implementing section 629(a) of the Act).

II. The Commission's Implementation of Section 629

The Initial Rulemaking Orders. The Commission in 1998 adopted rules implementing section 629 that required MVPDs to make available, by July 1, 2000, a security element (now commonly referred to as a "CableCARD") separate from the set-top box or other "host"

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[1] Congress specified that, "[u]pon an appropriate showing," the Commission "shall grant" a waiver request filed under section 629(c) within 90 days. 47 U.S.C. § 549(c).

navigation device.[2] The CableCARD is a credit card-sized module that plugs into a slot in the host device to perform the decoding function necessary for the subscriber to receive encrypted programming. The Commission concluded that this requirement that cable operators make CableCARDs available to consumers would allow unaffiliated consumer electronics companies to market navigation equipment commercially while allowing MVPDs to retain control over their system security. *1998 Order*, para. 49. For example, independent manufacturers could produce set-top boxes, television sets, or other equipment, which – with insertion of a CableCARD – could decode digital cable signals and permit the viewer to dispense with the cable company-provided STB.

The *1998 Order* also required cable operators, by January 2005, to stop leasing new set-top boxes or other equipment that performed both security and navigation functions on an integrated basis. *1998 Order*, para. 49.[3] The Commission determined that, even with unbundled security (*i.e.*, CableCARDs), the continued availability of integrated set-top boxes supplied exclusively by cable operators gave them an unfair competitive advantage in the nascent marketplace for navigation equipment. *Id.*, para. 69. The Commission acknowledged that permitting cable operators to continue providing integrated STBs might yield some short-term cost savings for subscribers, but concluded that such savings would likely be offset by increased

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[2] *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices* (CS Docket No. 97-80), 13 FCC Rcd 14775 (para. 76) (1998) ("*1998 Order*"), *petition for review denied, General Instrument Corp.*, 213 F.3d 724.

[3] The Commission, however, did not require cable operators to remove existing equipment from customers' homes. *1998 Order*, para. 69.

innovation and long-term manufacturing savings in an open, competitive market.[4] The Commission thus concluded that a phased prohibition on integrated navigation devices was required to fulfill the command of section 629(a) that it "assure that consumers have the ability to obtain navigation devices" from sources other than the MVPD. *Reconsideration Order*, para. 25.[5] This Court rejected challenges by the cable industry and others to the Commission's initial rulemaking orders in *General Instrument.*

At the cable industry's request, the Commission in 2003 extended (from January 2005 to July 2006) the deadline for implementing the integration ban.[6] The cable and consumer electronics industries recently had reached a "plug and play" agreement permitting consumer electronics manufacturers to integrate the one-way (but not the two-way) navigation functionalities of converter boxes into the television set itself, thus enabling consumers to attach "digital cable ready" televisions directly to the cable system with the use of a CableCARD (and without external navigation equipment). The Commission concluded that the deadline extension

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[4] *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices* (CS Docket No. 97-80), 14 FCC Rcd 7596, paras. 28, 30 (1999) ("*Reconsideration Order*"), *aff'd*, *General Instrument*, 213 F.3d 724.

[5] The Commission found that marketplace distinctions dictated a different result for navigation devices used to gain access to direct broadcast satellite ("DBS") services. *1998 Order*, para. 64; *Reconsideration Order*, paras. 36-37. Unlike the cable market, in which no navigation devices were available except through cable operators, integrated navigation devices for DBS were already available at retail – offering consumers competitive choices and declining prices. *See 1998 Order*, para. 64 (noting that at least 10 equipment manufacturers were already competing to provide DBS navigation devices to consumers at retail and that the price of equipment had fallen significantly over the preceding three years). The Commission therefore concluded that requiring DBS providers to separate security would serve little purpose and could be disruptive to that developing market. *See id.*, para. 64. It thus declined to extend the security separation requirements to DBS. *See* 47 C.F.R. § 76.1204(a)(2).

[6] *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, 18 FCC Rcd 7924 (para. 4) (2003) ("*Extension Order*").

was warranted to accommodate "business ordering and manufacturing cycles" related to the new plug and play agreement. *Extension Order*, para. 4. At the same time, the Commission asked the cable and consumer electronics industries to report on the status of still-ongoing efforts to reach agreement on two-way plug and play standards that would enable CE companies to manufacture "cable ready" televisions capable of gaining access to interactive cable programming and services, such as electronic program guides and video on-demand, without a cable converter box. *Extension Order*, para. 5.[7]

The *2005 Deferral Order*. In 2005, the Commission again extended the integration ban deadline at the cable industry's request – this time to July 1, 2007.[8] At the same time, the Commission reaffirmed, and expanded upon, its prior analysis of the need for de-integration of security and navigation functions to achieve the competitive purposes of section 629(a). The Commission explained that "[t]he prohibition on integrated devices appears to be one of the few reasonable mechanisms for assuring that MVPDs devote both their technical and business energies towards the creation of an environment in which competitive markets will develop." *2005 Deferral Order*, para. 30. In particular, "common reliance by MVPDs and consumer electronics manufacturers on an identical security function" would "align MVPDs' incentives with those of other industry participants so that MVPDs will plan the development of their

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[7] By contrast, one-way capabilities include only the tuning function that permits the viewer to change channels.

[8] *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, 20 FCC Rcd 6794 (para. 36) (2005) ("*2005 Deferral Order*"), *petition for review denied, Charter*, 460 F.3d 31. The Commission concluded that this additional extension was warranted to give the industry time to determine whether it was feasible to implement a downloadable security solution that would spare the expense of physically separating the security element from set-top boxes. *Id.*, para. 31.

services and technical standards to incorporate devices that can be independently manufactured, sold, and improved upon." *Ibid.* The Commission credited consumer electronics industry comments that, in the absence of the incentives created by such common reliance, the cable industry had not adequately supported CableCARD availability, notwithstanding the regulatory obligation to do so. *Id.*, paras. 21, 27, 39.

The Commission acknowledged once again that, with current technology, the "prohibition on the use of integrated devices will have certain cost and service disadvantages" in the short term. *2005 Deferral Order*, para. 29. However, it concluded that the costs associated with separate security and host devices "likely will decrease over time as volume usage increases." *Ibid.* The Commission also predicted that these short-term costs "should be counterbalanced to a significant extent by the benefits likely to flow from a more competitive and open supply market," including "potential savings to consumers from greater choice among navigation devices." *Ibid.*

Finally, the Commission rejected cable operators' arguments (*see id.*, para. 25) that it should eliminate the integration ban, because de-integration allegedly would hinder the transition to all-digital cable networks by preventing cable operators from offering low-cost boxes that would allow subscribers with analog televisions to receive digital cable signals. Instead, the Commission stated that it would "entertain requests for waiver of the prohibition on integrated devices for limited capability integrated digital cable boxes." *Id.*, para. 37.

Overall, the agency determined that the balance of benefits and burdens continued to support the integration ban. *Id.*, paras. 27, 32, 36, 39.

The *Charter* Decision. This Court affirmed the *2005 Deferral Order* in its 2006 *Charter* decision. The Court rejected cable industry claims that prohibiting integrated navigation devices

was unnecessary and wasteful in light of rules requiring cable operators to make CableCARDs available to consumers wishing to use equipment supplied by unaffiliated vendors. 460 F.3d at 40-41. To the contrary, the Court found reasonable the Commission's judgment that a "robust retail market for navigation devices" would not develop "in a manner consistent with [the Commission's] statutory obligation" unless cable operators' *economic incentives* (as well as their legal obligations) impelled them to support CableCARDs. *Id.* at 41 (quoting *2005 Deferral Order*, paras. 27, 36). And the Court deferred to the Commission's assessment that a prohibition on integrated navigation devices would properly align economic incentives (harnessing both "technical and business energies") by ensuring common reliance by cable operators and unaffiliated consumer electronics manufacturers on "the same security technology and conditional access interface." *Ibid.* (quoting *2005 Deferral Order*, paras. 27, 30).

The Court also rejected cable industry claims that the Commission had failed to justify adequately the costs of the integration ban. The Court found reasonable the Commission's conclusions that the cost of de-integrated equipment would likely decrease over time as scale economies were reached and that any short-term cost increases would likely be counterbalanced by competitive benefits in the form of greater choice and technological innovations. *Charter*, 460 F.3d at 41-42. The Court also noted that the Commission had "t[aken] steps to minimize industry costs" in two specific respects – by extending the implementation deadline from 2006 to 2007, and by promising to revisit the need for physical separation of security and non-security functions if the cable and consumer electronics industries were able to achieve a more cost-effective downloadable security solution capable of providing common reliance. *Id.* at 42. Finally, the Court stressed that the Commission's cost-benefit analysis found further support in

the fact that Congress had concluded that "the commercial availability of navigation devices from independent sources is a benefit in and of itself." *Ibid.*[9]

III. The Comcast Waiver Proceeding

While the *Charter* case was pending, Comcast petitioned the Commission's Media Bureau to waive the integration ban for three existing models of set-top boxes (the Motorola DCT-700, and two Pace Chicago boxes) and one box (manufactured by Scientific Atlanta) then under development. Comcast Request for Waiver at 4-7 (April 19, 2006) (J.A. 94-97).[10] Comcast is by far the nation's largest cable operator, with more than 24 million subscribers,[11] and it announced its intention, if the waiver were granted, to add up to 1.5 million of the subject boxes per year to the more than 5 million such boxes that it had placed in service to its customers before the integration ban took effect. Comcast Waiver Request at 10 (J.A. 100); Comcast Br. 17. Comcast claimed entitlement to relief from the integration ban on three independent waiver theories: (1) under the statutory waiver standard of section 629(c); (2) under the "low-cost, limited capability" box standard of the *2005 Deferral Order*; and (3) under the Commission's general waiver authority. *See* Comcast Application for Review at 2-10 (*2005 Deferral Order*), 10-15 (section 629(c)), and 15-25 (general waiver authority) (January 30, 2007) (J.A. 284-307).

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[9] After the *Charter* decision, the cable industry asked the Commission for yet another extension of the integration ban, this time for up to an additional two-and-a-half years. The Commission's Media Bureau denied that request in June 2007. *See Order*, para. 2 & n.13 (J.A. 12).

[10] The Comcast waiver request was followed in short order by petitions for waiver of the integration ban filed by more than 100 other MVPDs. *See Consolidated Requests for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, 22 FCC Rcd 11780 (para. 4 & Appendix) (Media Bur. 2007).

[11] By contrast, the next largest cable operator, Time Warner, has fewer than 13.5 million subscribers. National Cable & Telecommunications Association, "Top 25 MSOs," *available at* http://www.ncta.com/Statistic/Statistic/Top25MSOs.aspx.

In support of its request, Comsat and its allied commenters argued among other things that grant of the waiver would facilitate the development of digital cable services and assist in the transition to an all-digital cable network without impeding the development of a competitive marketplace for navigation devices. *See Comcast Corp.*, 22 FCC Rcd 228 (paras. 5-8) (Media Bur. 2007) ("*Bureau Order*") (J.A. 33-35) (summarizing arguments). According to Comcast, grant of the waiver would have no effect on its support for CableCARDs, which were already being used in competitive devices and would be used in Comcast's own high-end devices once the integration ban went into effect. *Bureau Order*, para. 6 (J.A. 34). Moreover, Comcast asserted that competitive equipment suppliers had shown no interest in producing lower-end boxes of the type for which it was seeking a waiver. *Bureau Order*, paras. 6, 10 (J.A. 34, 35-36).

Opponents of Comcast's waiver request – including the consumer electronics industry's trade association – argued that granting Comcast such a broad waiver would unfairly advantage it and other cable operators in the market for navigation devices, contrary to the goals of section 629. For one thing, they argued, it would enable Comcast to retain a substantial base of subscribers using integrated devices, ensuring that it would take many years for the number of separate-security devices in the market to equal the number of integrated devices in use. *Bureau Order*, para. 9 (J.A. 35).[12] This impediment to widespread use of integrated devices, they maintained, would hinder competitive providers' efforts to attain scale economies for their separate-security products, and would also dampen Comcast's incentive adequately to support

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[12] *See* Consumer Electronics Ass'n ("CEA") Comments at 2-4 (June 15, 2006) (J.A. 133-35); IT Comments (Hewlett-Parkard, Intel, and Sony) at 8 (June 15, 2006) (J.A. 149); Sony Comments at 4 (June 15, 2006) (J.A. 164).

CableCARD usage. *Id.*, paras. 9, 12 (J.A. 35, 36-37).[13] Moreover, consumer electronics manufacturers asserted that, far from simply aiding the transition to all-digital cable by providing basic digital-to-analog conversion, the boxes for which Comcast sought a waiver offered critical two-way interactive capabilities that no independent manufacturers could provide. *Bureau Order*, paras. 10-11 (J.A. 35-36).[14] These commenters argued, accordingly, that a grant of the waiver request would effectively shut independent providers out of an important segment of the navigation device market, perpetuating the very competitive inequality that section 629 and the integration ban were intended to eliminate. *Ibid.*

On January 10, 2007, the Commission's Media Bureau, acting on delegated authority, denied Comcast's petition, finding that Comcast had failed to establish entitlement to relief under any of the three waiver standards Comcast had invoked. *Bureau Order*, paras.15-23 (section 629(c)), paras. 24-30 (*2005 Deferral Order*), paras. 31-33 (general waiver authority) (J.A. 38-45). Over the ensuing six months, the Bureau also denied waiver requests similar to Comcast's filed by a number of small-to-midsized cable operators[15] and an across-the-board request for waiver of the integration ban filed by the cable industry's largest trade association, National Cable & Telecommunications Association ("NCTA").[16] In addition, the Bureau acted upon more than 100 other waiver requests, denying all of them insofar as they were predicated upon

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[13] *See* CEA Comments at 6-7, 7-10 (June 15, 2006) (J.A. 137-41); IT Comments at 6-8 (June 15, 2006) (J.A. 147-49); Sharp Electronics Corporation Comments at 2 (June 15, 2006) (J.A. 159).

[14] *See* Letter from Jim Morgan, Sony Electronics, Inc., to FCC Secretary, at 7-8 (August 4, 2006) (J.A. 226-27); CEA Comments at 13 (June 15, 2006) (J.A. 144).

[15] *Armstrong Utilities, Inc., et al. Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, 22 FCC Rcd 11725 (Media Bur. 2007).

[16] *National Cable & Telecommunications Association Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, 22 FCC Rcd 11767 (Media Bur. 2007).

section 629(c) or the *2005 Deferral Order*, but granting relief under the agency's general waiver authority on the basis of non-speculative commitments (eschewed by Comcast and the other rejected waiver applicants) to operate all-digital systems no later than February 17, 2009,[17] or on the basis of highly unusual circumstances affecting the Bureau's assessment of the public interest. *See* Letter, dated September 4, 2007, from Monica Desai, Chief, Media Bureau, to Jonathan Friedman, counsel for Comcast, at 4-6 ("Desai Letter") (J.A. 368-70) (cataloguing the Bureau's treatment of waiver requests under its general waiver authority). No applications for review were filed (by Comcast or anyone else) challenging any of the staff's waiver grants, so the Commission never had any occasion to review them.

Comcast, however, did seek Commission review of the Bureau's denial of its waiver, and in the *Order* on review, the Commission affirmed the staff's action, finding unanimously that Comcast had not justified a waiver. First, consistent with the Media Bureau's ruling on every request for waiver of the July 1, 2007, integration ban deadline, the Commission held that Comcast's request did not meet the narrow waiver criteria set out in section 629(c). In particular, notwithstanding Comcast's claim that a waiver would facilitate the introduction of new services, the Commission found that "all Comcast subscribers [already] live in markets where Comcast has launched digital service;" moreover, the agency "fully expect[ed] Comcast to continue to develop and introduce digital services in a rapid manner in the absence of a waiver." *Order*, para. 10 (J.A. 17). The Commission concluded, accordingly, that Comcast had "failed to show

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[17] *See, e.g., Consolidated Requests for Waiver*, para. 1; *Bend Cable Communications, LLC d/b/a/ BendBroadband Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, 22 FCC Rcd 209 (paras. 21-26) (Media Bur. 2007).

that a waiver is 'necessary' here to assist the 'development or introduction' of new or improved services." *Ibid.* (quoting section 629(c)) (J.A. 17).

The Commission also affirmed the Bureau's determination, consistent with every other waiver order, that the particular set-top boxes for which Comcast sought a waiver were not "low-cost, limited-capability set-top boxes" of the sort contemplated by the *2005 Deferral Order*. To the contrary, the boxes at issue contained a number of advanced features, such as on-screen program guides, pay-per-view services, video on demand, and interactive television. *Order*, para. 14 (J.A. 19-21). Indeed, the Commission noted, the cable industry's representatives, in earlier regulatory proceedings, had argued to the Commission that those very functionalities were "advanced" capabilities rather than "limited" ones. *Id.*, para. 15 (J.A. 21).

Addressing Comcast's request under the general waiver standard, the Commission noted first that it had already determined (with this Court's recent approval in *Charter*) that "the benefits [of de-integration] justified any potential harms, including the potential increased cost of set-top boxes." *Order*, para. 17 (J.A. 22) (citing *2005 Deferral Order*, para. 29). Because "[t]he paramount goal of the integration ban is a competitive navigation device market," the Commission concluded "that the Bureau correctly weighed this objective heavily when evaluating the relative public interest benefits and harms associated with Comcast's request." *Ibid.* In particular, notwithstanding some potential short-term benefits of a waiver in terms of lower prices, a waiver "would have created an exception to the integration ban rule that would have substantially undermined the goals of common reliance" without facilitating the digital transition in any non-speculative way. *Id.*, paras. 17, 20 n.99 (J.A. 22-23, 25). Finally, the Commission rejected Comcast's suggestion that it was required to grant Comcast's waiver request because the staff in unchallenged decisions had granted waivers to other companies.

Those were not decisions of the Commission, and, in all events, the waiver applicants in those cases were "not similarly situated to Comcast." *Id.*, para. 20 n.99 (J.A. 25).

INTRODUCTION AND SUMMARY OF ARGUMENT

In August 2006, this Court affirmed the Commission's decision in the *2005 Deferral Order* finally to implement the integration ban on July 1, 2007, after two separate cable industry-requested delays. *Charter*, 460 F.3d 31. In doing so, the Court rejected a host of cable industry claims, including: (1) that the Commission had misread Congress's purpose in enacting section 629(a) of the Communications Act, 460 F.3d at 37-39, 42; (2) that competitive conditions and the regulatory mandate to support CableCARDs rendered the integration ban unnecessary, *id.* at 40-41, 43-44; (3) that the Commission had failed adequately to consider the costs and benefits of the integration ban, *id.* at 41-42; and (4) that the Commission had discriminated against the cable industry and distorted the MVPD marketplace by imposing the integration ban on cable operators while exempting DBS providers, *id.* at 42-43. In its arguments to this Court attacking the denial of its waiver request, Comcast in large measure relaunches those failed general attacks on the integration ban without a single substantive reference to this Court's decision rejecting them. Its challenges to the *Order* on review are without merit and fall well short of the required showing that the Commission's reasoning is "so insubstantial as to render the [waiver] denial an abuse of discretion." *BDPCS, Inc. v. FCC*, 351 F.3d 1177, 1181-82 (D.C. Cir. 2003) (internal quotations omitted).

1. The Commission properly denied Comcast's request for waiver of the integration ban pursuant to section 629(c) of the Communications Act. That provision requires the grant of a waiver only when "necessary" to assist in the "development or introduction of a new or improved" multichannel video programming service. Although Comcast asserts that a waiver

was needed to migrate analog customers to digital services and to redeploy reclaimed spectrum to digital services (Br. 16-17), the Commission found (and Comcast does not dispute) that all Comcast subscribers already live in markets where Comcast offers digital service, and the agency reasonably predicted that the company would continue rapidly to introduce digital services without the requested waiver. *Order*, para. 10 (J.A. 17). Construing section 629(c) to require the grant of a waiver under these circumstances would have "effectively negate[d]" any rule adopted under section 629, and the agency thus properly rejected Comcast's "lenient" reading of that statutory waiver standard. *Order*, para. 9 (J.A. 16).

The Commission also properly rejected Comcast's claims that denial of the waiver would unreasonably increase the cost of cable service without advancing the common reliance goals underlying the integration ban. In *Charter*, this Court rejected similar challenges to the integration ban itself. 460 F.3d at 42-43. Comcast has provided no basis to compel a change in the results of the Commission's cost-benefit analysis here.

2. The Commission also properly rejected Comcast's waiver request under the standard, announced in the *2005 Deferral Order*, that the agency would entertain waivers for certain low-cost, limited capability cable boxes the cable industry might deploy to assist in the transition from analog to digital cable service. The Commission found that each of the STBs for which Comcast sought a waiver offered functionalities beyond the simple digital-to-analog signal conversion contemplated in the 2005 order – containing instead two-way interactive capabilities that no competitive navigation devices sold at retail possess and that the cable industry itself has characterized as "advanced" in analogous contexts. *Order*, paras. 12-15 (J.A. 18-21). The agency's reasonable interpretation and implementation of its own prior order is entitled to deference. *MCI WorldCom Networks Services, Inc. v. FCC*, 274 F.3d 542, 547 (D.C. Cir. 2001).

3. The Commission reasonably balanced the alleged benefits and burdens associated with Comcast's waiver request under the agency's general waiver authority. *Order*, paras. 16-17 (J.A. 21-23). Comcast contends that the Commission's analysis ignores the costs of the integration ban, exaggerates the effect of a waiver on common reliance, and ignores alleged competitive distortions caused by staff waivers granted other MVPDs and the exemption (by rule) of DBS. Once again, however, these claims essentially reprise arguments that this Court considered and properly rejected in *Charter*, 46 F.3d at 40-44. They are no more substantial here – and certainly do not meet the required showing in waiver denial cases that the Commission's reasoning is "so insubstantial as to render the denial an abuse of discretion." *BDPCS, Inc. v. FCC*, 351 F.3d 1181-82 (internal quotations omitted).

4. Finally, this Court should reject Comcast's claim that the Commission's decision to deny its waiver request was unlawfully inconsistent with recent staff decisions granting waivers to other providers. That claim fails at the threshold because Comcast can identify no *Commission* waiver decision that it alleges is inconsistent with the *Order* on review. The Commission itself has addressed only one waiver request – Comcast's. And the law of this Circuit is clear that the Commission itself is not bound by, and has no obligation to act consistently with, decisions of its staff. *Order*, para. 20 n.99 (J.A. 25) (citing *Amor Family Broadcasting Group v. FCC*, 918 F.2d 960, 962 (D.C. Cir. 1990)); *MacLeod v. ICC*, 54 F.3d 888, 891 (D.C. Cir. 1995).

In any event, even if this Court's precedent permitted Comcast to establish a claim of disparate treatment between the Commission and its staff, it would have to demonstrate that the parties in question are similarly situated. As Comcast effectively acknowledges by stating that "none" of the staff decisions granting waivers "is of any practical benefit to Comcast" (Br. 35),

the Commission properly found that Comcast was "not similarly situated" to those companies that received staff waivers. *Order*, para. 20 n.99 (J.A. 25).

STANDARD OF REVIEW

To the extent that Comcast challenges the statutory basis for the FCC's action in this case, the Commission's interpretations of the Communications Act generally, *see*, *e.g.*, *Cellco Partnership v. FCC*, 357 F.3d 88, 94 (D.C. Cir. 2004) (citation omitted), and of section 629 in particular, *see General Instrument*, 213 F.3d at 730, are governed by the principles set out in *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Under *Chevron,* if "Congress has directly spoken to the precise question at issue," the Court "must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. But "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. *See also National Cable & Telecommunications Ass'n v. Brand X Internet Services,* 545 U.S. 967, 980 (2005) (under *Chevron*, "ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion").

To the extent that Comcast challenges the reasonableness of the Commission's decision, the Court must affirm the agency unless its action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This "[h]ighly deferential" standard of review "presumes the validity of agency action." *AT&T Corp. v. FCC*, 220 F.3d 607, 616 (D.C. Cir. 2000) (internal quotations omitted).

When reviewing an agency decision refusing to exempt a party from a generally-applicable rule, this Court's application of the arbitrary and capricious standard is particularly deferential. "[R]eview of an agency's denial of a waiver" may result in reversal "only when 'the

agency's reasons are so insubstantial as to render the denial an abuse of discretion.'" *BDPCS, Inc. v. FCC*, 351 F.3d at 1181-82 (quoting *Mountain Solutions, Ltd. v. FCC*, 197 F.3d 512, 517 (D.C. Cir. 1999)).

Moreover, when, as in this case, the agency's explanation involves "cost-benefit analyses" and predictive judgments about "future market behavior" with respect to new technologies, the Court must affirm the agency's reasonable assessments. *Charter*, 460 F.3d at 41, 42, 44-45. Ultimately, the Court may "not compel the Commission to grant a waiver * * * so long as the request was given at least a 'hard look' to ensure that the agency is not rigidly applying a rule where it is not in the public interest." *Delta Radio v. FCC*, 387 F.3d 897, 900-01 (D.C. Cir. 2004).

ARGUMENT

Comcast sought a waiver of the integration ban under three prescribed waiver standards: (1) the statutory direction to waive rules adopted under section 629(a) "for a limited time" upon "an appropriate showing" that such waiver "is necessary to assist the development or introduction" of new or improved multichannel video programming or services (section 629(c)); (2) the Commission's statement that it would "entertain requests for waiver" of the integration ban for certain "limited capability" boxes that lack "advanced capabilities" (*2005 Deferral Order*, para. 37); and (3) the Commission's general authority to waive its rules for "good cause" when the "public interest" so requires (47 C.F.R. §§ 1.3 & 76.7(i)). In the *Order* on review, the Commission reasonably denied Comcast's waiver request under each of its proffered theories. *Order*, paras. 1, 7 (J.A. 11-12, 15-16).

I. THE COMMISSION REASONABLY DENIED COMCAST'S REQUEST FOR WAIVER UNDER SECTION 629(c)

Section 629(c) requires the Commission to grant a waiver of its navigation device rules when "*necessary* to assist the development or introduction of a *new or improved* multichannel video programming or other service offered over multichannel programming systems, technology or products." 47 U.S.C. § 549(c) (emphasis added). Comcast argues that the Commission violated section 629(c) in denying its waiver request, because the subject low-cost STBs allegedly are "necessary to assist" Comcast in "migrat[ing] analog customers to digital services and redeploy[ing] reclaimed spectrum to digital services." Br. 16-17; *see also* NCTA Br. 9. The Commission, however, properly concluded that Comcast's waiver request did not meet the requirements of section 629(c), *Order*, para. 9 (J.A. 16-17), and Comcast does not come close to satisfying the demanding standard this Court requires parties to meet when challenging waiver denials, *BDPCS, Inc. v. FCC*, 351 F.3d at 1181-82.

A. The Commission Reasonably Concluded That A Waiver Was Not "Necessary To Assist The Development Or Introduction Of A New Or Improved" Service By Comcast

In concluding that the STBs for which Comcast sought a waiver were not "necessary to assist" in the development or introduction of "new or improved" video services or programming under section 629(c), the Commission properly interpreted that statutory waiver provision in light of section 629's overall competitive goals. That provision, the Commission explained, had to require Comcast to "'show more than simply that compliance with the [integration ban] will impose a nonzero cost,'" *Order*, para. 10 n.54 (J.A. 17) (quoting CEA Opposition at 8 (February 14, 2007) (J.A. 311)), or that a waiver might simply aid its "ability to expand or enhance digital services," *id.*, para. 9 (J.A. 16). Otherwise, "it could be argued that a waiver under Section

629(c) would assist the development or introduction of virtually any service offered by an MVPD." *Order*, para. 9 (J.A. 16).

The Commission reasonably rejected the "lenient" reading implicit in Comcast's waiver request because it would flout the statutory standard requiring waivers only when "necessary" and would "effectively negate" any rule adopted under section 629(a). *Ibid.* This would "eviscerate the very purpose of the integration ban" by "lead[ing] to the deployment of a substantial number of integrated devices" and undermining common reliance. *Ibid.* Instead, the Commission properly applied the statutory waiver standard in a manner that would preserve the "proper balance" – affirmed by this Court in *Charter* – between the integration ban's transitory burdens and long-term competitive benefits. *Order*, para. 10 (J.A. 17).

Comcast has no legitimate basis to complain about the Commission's balanced approach to determining whether its waiver was "necessary." As an initial matter, the digital cable services Comcast seeks to offer using the subject STBs (such as video-on-demand services) have been available for years and are hardly "new" or "improved." *See Bureau Order*, para. 18 & n.78 (J.A. 39). The Commission found (and Comcast does not dispute) that "all Comcast subscribers" already "live in markets where Comcast has launched digital service." *Order*, para. 10 (J.A. 17).[18]

Moreover, even if the services Comcast sought to offer through the subject STBs qualified as "new" or "improved," Comcast does not seriously claim that a waiver was objectively "necessary" to permit its analog-to-digital migration. It simply asserts that, without

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[18] This focus under section 629(c) on the nature of the services Comcast could offer using the subject STBs belies Comcast's glib assertion that "the FCC claimed that the *STBs* were 'not advanced enough' for waiver under Section 629(c), but 'too advanced' for waiver under the [*2005 Deferral Order*]." Br. 14 (emphasis added); *see also id.* at 26.

the waiver, it "cannot accomplish" that migration "as planned." Br. 17. Given that Comcast has never publicly committed to any particular migration "plan[]," however, that statement is so vague and unsubstantiated as to be meaningless.[19]

In any event, citing Comcast's own statements, the Commission reasonably predicted that Comcast would "continue to develop and introduce digital services in a rapid manner in the absence of a waiver," rendering such a waiver not "necessary." *Order*, para. 10 & n.51 (J.A. 17). That is a predictive judgment to which the Court is "bound to defer," *Charter*, 460 F.3d at 41, and it was eminently reasonable. As cable companies themselves acknowledge, they have a natural incentive to transition customers from analog to digital because, among other reasons, it enables them to sell additional services, such as video on demand, and opens bandwidth for other uses.[20] It is therefore little wonder that Comcast's Chief Financial Officer recently told investors that Comcast "did, I think, a very good job in '07, in terms of deploying digital overall, in terms of our penetration rate, and that is a key focus for us in '08."[21] Indeed, without any mention of STBs, much less the integration ban, he predicted that "certain markets [would] go all digital," which "is a natural evolution for us."[22]

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[19] At most, Comcast expressed a generalized "intention" to migrate "its cable systems to all-digital networks" at some undefined point in "subsequent years" following the end of this decade. Comcast Application for Review at 20 (January 30, 2007) (J.A. 302).

[20] *See* NCTA Comments, CS Docket No. 98-120, at 5 (July 16, 2007) (noting that "cable operators have every incentive to move customers to digital" in order to enable them to enjoy digital video recorders, video on demand, and digital programming tiers) (excerpt attached in addendum to this brief).

[21] Remarks of Michael Angelakis to Citigroup 18th Annual Entertainment, Media & Telecommunications Conference (Jan. 9, 2008) at 13:42-13:50, *available (under Recent Events and Presentations) at* http://www.cmcsk.com/phoenix.zhtml?c=118591&p=irol-audioArchives.

[22] *Id.* at 13:15-13:26.

Although Comcast asserts that the increased cost of de-integrated STBs would particularly discourage the adoption of entry-level digital service by cost-conscious subscribers, the Commission reasonably rejected that claim. *Order*, para. 10 (J.A. 17). For one thing, Comcast, which is not reticent about citing post-record evidence at other points in its brief, *see, e.g.*, Br. 18, tellingly does not claim that it has actually increased STB lease prices to consumers at all since July 1, 2007. In any event, even if Comcast has passed on to consumers all of the "additional costs of STBs that are *two* to *four times* more expensive" (Br. 19 (emphasis in original)), the company greatly exaggerates what this would mean on a monthly cable bill. *See also* NCTA Br. 10-14. The record suggested that the practical effect of substituting available de-integrated STBs for the subject boxes would add at most $2 to $4 to monthly cable bills.[23] Such a charge would constitute a one-time increment in the 4-to-7 percent range to the average overall industry charge for digital cable service.[24] In these circumstances, there is no basis to upset the Commission's predictive judgment that, notwithstanding denial of the waiver, consumers would continue to migrate toward digital service in a manner consistent with the competitive goals of section 629.[25] *See Charter*, 460 F.3d at 41 (finding that the Court was "bound to defer" to a similar predictive judgment).

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[23] Letter from Jeffrey Ross, Armstrong Utilities, Inc., to Heather Dixon, Legal Advisor to Chairman Martin, at 1-2 (September 11, 2006) (J.A. 249-50).

[24] *See Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992* (MM Docket No. 92-266), Report on Cable Industry Prices, 21 FCC Rcd 15087, 15103 (Attachment 2) (2006) (reporting that the average monthly price of digital cable service as of January 1, 2005, was $ 56.03 ($43.04 for basic and expanded basic tiers, plus $12.99 for digital tier and related equipment)).

[25] *Order*, para. 10 (J.A. 17).

Comcast counters, on the basis of post-record evidence, that its rate of digital migration declined by 40% in the quarter following implementation of the integration ban. Br. 19.[26] However, there is substantial reason to believe that the decline in the rate of digital migration after the integration ban went into effect did not stem from the denial of Comcast's waiver request, but rather from an unusually high rate of digital migration in the preceding quarters. As Comcast itself has explained in other settings, it made a concerted push, before the July 1, 2007, integration ban went into effect, to convert customers to digital cable and to deploy as many non-compliant, integrated STBs as possible. *See* Comcast Press Release, "Comcast Reports Third Quarter 2007 Results," at 2 (October 25, 2007) ("Year to date through September 30, 2007, Comcast added nearly 2.0 million digital cable subscribers, an increase of 56% from the 1.3 million added during the same period one year ago *reflecting Comcast's success with accelerating digital set-top box deployments ahead of a July 1, 2007 regulatory deadline.*") (emphasis added).[27] Indeed, Comcast Chairman Brian Roberts stressed last summer that "we feel we've put a lot of emphasis on the July 1 cutoff. I think 2 million boxes had to get moved, *one way or another.*"[28]

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[26] This claim was not subjected to administrative review and thus is barred by 47 U.S.C. § 405(a), which precludes claims on which the Commission was given "no opportunity to pass."

[27] *available at* http://media.corporate-ir.net/media_files/irol/11/118591/Earnings_3Q07/release_pdf.pdf.

[28] Seeking Alpha, "Comcast Q2 2007 Earnings Call Transcript" (July 26, 2007), *available at* http://seekingalpha.com/article/42504-comcast-q2-2007-earnings-call-transcript (emphasis added); *see also* Communications Daily, "Cable Operators Vary on Marketing Digital Service to Analog Customers," 2007 WLNR 11574956 (June 18, 2007) (noting Comcast's decision "in many markets" quickly to get rid of its inventory of non-compliant, integrated devices by offering promotions (in advance of the integration ban deadline) that would grant consumers "a year of digital free to those that switch" to digital service).

In all events, acknowledging that some cost increase and some effect on digital subscribership may result from the integration ban, the Commission reasonably determined – under its balanced reading of section 629(c) – that the subject STBs were not "necessary" to assist in the introduction or development of new or improved services. Comcast provides no basis to overturn that determination, which reflected the balance of benefits (*e.g.*, common reliance) and potential harms (*e.g.*, short-term cost increases) that this Court affirmed in *Charter*, 460 F.3d at 42.

B. The Commission Reasonably Concluded That A Waiver For Comcast Would Undermine Common Reliance And A Competitive Market For Navigation Devices

Comcast also argues that the Commission had no record basis upon which to conclude that a grant of the waiver request would undermine common reliance. Br. 22; *see also* NCTA Br. 19-21. But the breadth of the request – which Comcast confirms, indeed trumpets, in its brief – provided ample basis for the Commission's concern. *See Order*, para. 9 & n.47 (J.A. 16); Comcast Br. 17 (noting that Comcast has deployed more than 5 million DCT-700s). As CE commenters stressed, the continued presence in the market of substantial numbers of integrated devices necessarily dampens the cable companies' incentive to support CableCARD use in competitive navigation devices.[29] At the same time, such broad waivers would prevent achievement of "economies of scale * * * with respect to the production costs of CableCARDs."

[29] CEA Comments at 4 (June 15, 2006) (J.A. 135).

Order, para. 6 (J.A. 15).[30] Indeed, the CE parties argued in the record that "enforcement of the integration ban for all of the set-top boxes deployed by Comcast and other multiple system operators is the only way to ensure that economies of scale are achieved with respect to the production costs of CableCARDs." *Order*, para. 6 (J.A. 15).

To support its common reliance claim, Comcast asserts (based on post-record evidence) that, in the short time since the integration ban took effect, it has already deployed "over 600,000 CableCARD-enabled STBs." Br. 22. That claim is quite remarkable, given that many of those newly deployed STBs almost certainly would not have been deployed if Comcast's waiver request had been granted. Moreover, far from advancing its case, Comcast's further contention that this figure represents more than twice as many CableCARDs as have been deployed to date in retail digital cable-ready devices (Br. 22-23) serves only to illustrate how difficult it has been for competitive devices to establish a competitive toehold. Indeed, this Court cited the low number of CableCARDs deployed for use in CableCARD-ready devices at retail as evidence that the cable industry was *not* "support[ing]" use by consumers of competitive navigation devices. *Charter*, 460 F.3d at 43; *see also id.* at 40. If the cable industry had supported the CableCARD without the integration ban, the number deployed in competitive devices would have been dramatically higher. That Comcast could have so quickly eclipsed the number of CableCARDs

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[30] *See also Order*, para. 14 n.73 (J.A. 20) ("'grant of the Waiver Request would decrease today's CableCARD market base by an estimated thirty to forty percent, resulting in the concurrent loss of volume production benefits to consumers'" (quoting Sony Opposition at 17 (February 14, 2007) (J.A. 319))); CEA Opposition at 4 (February 14, 2007) (J.A. 309) (grant of waiver to Comcast would "further delay the volume production, and the associated savings and efficiencies, that finally would arrive with reliance on CableCARDs by the major [cable operators]").

deployed in competitive devices demonstrates why the integration ban – not a waiver from it – is needed.

Indeed, a grant of Comcast's waiver request would have actually perpetuated a competitive disparity between the cable operator and its retail competitors. Armed with a waiver, Comcast would have been able to give customers access on an integrated basis to two-way functionalities that no retail supplier can offer today, further skewing the marketplace in favor of cable. *See Order*, para. 9 (J.A. 16-17) (noting the failure to date of the cable and consumer electronics industries to reach an agreement that would enable the development and sale of two-way, interactive navigation devices at retail).

C. Comcast's Remaining Objections To The Commission's Denial Of Its Waiver Request Under Section 629(c) Are Meritless

Comcast's additional, scatter-shot objections to the denial of its waiver under section 629(c) all fail.

First, there is no merit to Comcast's assertion (Br. 23-24) that the Commission was interpreting section 629(c) in the *2005 Deferral Order* when it stated that it would entertain requests for waiver of the integration ban with respect to certain low-cost, limited capability STBs. Nowhere in the relevant discussion in the *2005 Deferral Order* did the Commission purport to interpret section 629(c) and, in the *Order* on review, the Commission expressly stated that the standard articulated in the 2005 order was simply "a narrow application of the Commission's general waiver authority." *Order*, para. 13 n.66 (J.A. 19) (citing 47 C.F.R. §§ 1.3 & 76.7). That reasonable interpretation by the agency of its own prior order is entitled to deference. *See MCI WorldCom Networks Services, Inc. v. FCC*, 274 F.3d at 547 ("an agency's interpretation of the intended effect of its own orders is controlling unless clearly erroneous");

accord AT&T Corp. v. FCC, 448 F.3d 426, 431 (D.C. Cir. 2006). Comcast's argument is beside the point, in all events, since, as discussed below, the Commission reasonably concluded that Comcast's waiver did not meet the waiver standard announced in the *2005 Deferral Order* either.

Second, contrary to Comcast's assertion, there was nothing improper about the Commission's general observation that parties requesting a waiver of the integration ban bear a "'heavy burden.'" Br. 24-25 (quoting *Order*, para. 4 (J.A. 14)). As the Commission noted in making that observation (*Order*, para. 4 n.21), this Court itself has stressed that those seeking a waiver from a generally-applicable rule bear a "heavy burden" to demonstrate that their "arguments are substantially different from those which have been carefully considered at the rulemaking proceeding." *Industrial Broadcasting Co. v. FCC*, 437 F.2d 680, 683 (D.C. Cir. 1970). Having concluded in the relevant rulemaking orders that "common reliance" resulting from the integration ban was essential to the achievement of Congress's goal of a competitive market for navigation devices; having had that determination affirmed by this Court in both *General Instrument* and *Charter*; and having twice deferred implementation of that essential ban at the cable industry's request, it was entirely reasonable for the Commission to posit that it would require a strong showing to establish that the public interest would support further delay. *Order*, paras. 3-4 (J.A. 13-14).[31]

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[31] Contrary to Comcast's claim (Br. 25 (citing *Order*, para. 9 (J.A. 16-17)), the Commission did not condition the availability of waivers on the presence of an agreement between the cable and consumer electronics industries on standards for two-way digital cable-ready products. Rather, the Commission cited the absence of such an agreement as strong evidence that the retail navigation devices market that Congress directed the Commission to help establish did not yet exist – further underscoring the need for the integration ban absent an overriding public interest justification.

Finally, Comcast's claim (Br. 24-25) that the Commission imposed discriminatory burdens on Comcast in its application of the section 629(c) waiver standard is baseless. Not one of the "over 140 other MVPDs" granted waivers of the integration ban in connection with the July 2007 implementation deadline (Br. 24) received its waiver under section 629(c). The staff decisions addressing those waiver requests, therefore, provide no plausible basis for a claim of unlawful disparate treatment under that provision.[32]

II. THE COMMISSION REASONABLY DETERMINED THAT THE STBs FOR WHICH COMCAST SOUGHT A WAIVER DID NOT QUALIFY AS "LOW-COST, LIMITED CAPABILITY" BOXES WITHIN THE MEANING OF THE *2005 DEFERRAL ORDER*

Positing in the *2005 Deferral Order* that "consumer[] * * * access to inexpensive digital set-top boxes that will permit the viewing of digital programming on analog television sets" could assist the transition to all-digital cable networks, the Commission expressed its intent to "entertain requests for waiver of the prohibition on integrated devices for limited capability integrated digital cable boxes." *2005 Deferral Order*, para. 37. At the same time, sensitive to the potential impact on "the development of the competitive [navigation device] marketplace

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[32] Comcast's suggestion (Br. 9, 13, 16) that the Commission unlawfully failed to act on its waiver request under section 629(c) within 90 days is makeweight. *See also* NCTA Br. 22-23. As the Commission observed, "section 629(c) expressly limits the 90-day requirement to waiver requests making 'an appropriate showing' that such waiver is necessary." *Order*, para. 11 n.60 (J.A. 18). The Commission thus reasonably concluded that the "90-day procedural requirement d[id] not apply" because "Comcast's request did not satisfy the substantive requirements" of that provision. *Ibid.* In any event, even if the 90-day requirement of section 629(c) were applicable in this case, the fact that the Commission has, in fact, acted on the waiver request renders Comcast's complaint about the timing of the Commission's action moot. *See Gottlieb v. Pena*, 41 F.3d 730, 733 (D.C. Cir. 1994) (noting that "where Congress has placed an agency under a legal obligation to render a decision within a stated time period but has not set forth the consequences of exceeding that period, ordinarily the time period is directory rather than mandatory," and the failure to comply with the deadline does not vitiate the agency's subsequent action) (internal quotations omitted).

envisioned in Section 629," the Commission cautioned that such waivers likely would not be warranted "for devices that contain personal video recording ("PVR"), high-definition, broadband Internet access, multiple tuner, or other similar advanced capabilities." *Ibid.* In the *Order* on review, the Commission reasonably concluded that the STBs for which Comcast sought waiver of the integration ban – each of which contains two-way, interactive capabilities that no competitive navigation devices sold at retail currently possess and that the cable industry itself has labeled "advanced" – did not satisfy the *2005 Deferral Order* waiver standard. *Order*, paras. 12-15 (J.A. 18-21). That reasonable interpretation by the Commission of its prior order must be given "controlling" weight. *MCI WorldCom*, 274 F.3d at 547.

Comcast argues that the STBs for which it sought a waiver must fall within the scope of the *2005 Deferral Order*'s waiver standard because those boxes allegedly "are the lowest-cost, most limited capability digital boxes ever deployed by the cable industry." Br. 26. Comcast adds that one-way digital cable boxes "have never existed in the marketplace." Br. 27; *see also* NCTA Br. 14-15. Thus, Comcast claims, it "would have made no sense" for the Commission, in the *2005 Deferral Order*, to have spoken of "not 'displac[ing]' a low-cost box option," if it had meant to include only one-way devices within the scope of the waiver standard it was adopting. Br. 27 (quoting *2005 Deferral Order*, para. 37). These arguments do not come close to establishing – as Comcast must to prevail – that the Commission's interpretation of the *2005 Deferral Order* is "clearly erroneous." *MCI WorldCom*, 274 F.3d at 547.

First, the Commission stressed that the 2005 order "expressly warned" that waivers would not be warranted for devices providing "'advanced capabilities.'" *Order*, para. 14 (J.A. 20) (quoting *2005 Deferral Order*, para. 37). The 2005 order itself had made clear that it was not including an exhaustive catalogue of services covered by that term, and the Commission thus

considered regulatory context in concluding that two-way capabilities fell within its scope. In the closely related plug and play context, for instance, digital cable products with two-way capabilities had uniformly been categorized as "advanced" by the cable industry itself. *Bureau Order*, para. 27 & n.101 (J.A. 43) (citing Memorandum of Understanding Among Cable MSOs and Consumer Electronics Manufacturers, CS Docket No. 97-80 & PP Docket No. 00-67, at 3, 4, 6-7, 10 (December 19, 2002) (referring to "advanced interactive (two-way) digital cable" products and services)(excerpt attached in addendum)). Indeed, the cable industry had urged the Commission to require that equipment made by its consumer electronics competitors bear a warning label stating that "'[c]ertain *advanced* and interactive digital cable services such as *video-on-demand, a cable operator's enhanced program guide* and data-enhanced television services may require the use of a set-top box.'" *Order*, para. 15 (J.A. 21) (emphasis added) (quoting NCTA Reply Comments, CS Docket No. 97-80 & PP Docket No. 00-67, Appendix 1 at 7 (April 28, 2003) (excerpt attached), and citing NCTA Comments, CS Docket No. 97-80 & PP Docket No. 00-67, at 5-6 (March 28, 2003)(excerpt attached)). The Commission explained that the plug and play rules were "inherently related" to the integration ban and associated rules in that "both sets of rules were adopted pursuant to the Commission's authority under Section 629" and both were designed to help assure a functioning retail marketplace for de-integrated navigation devices. *Order*, para. 15 (J.A. 21).

Furthermore, more recently, the cable industry referred to two-way, interactive functions as "advanced" not just in the context of the Commission's plug and play rules, but in the context of the integration ban itself. Specifically, in seeking a waiver of the integration ban deadline, pending possible development of a downloadable security solution, intervenor NCTA referred to "*advanced services* such as video-on-demand * * * [and] interactive program guides," and

claimed that the "*advanced*," "new and improved" nature of those services was a factor that the Commission should favorably consider in acting upon its waiver request. NCTA Request for Waiver, CSR-7056-Z, at 14 (August 16, 2006) (emphasis added) (excerpt attached in addendum). In interpreting and applying the *2005 Deferral Order* waiver standard, it was hardly unreasonable for the Commission to construe the term of art, "advanced" services, in the same way as the cable industry. *Order*, para. 15 n.79 (J.A. 21).

The Commission also reasonably concluded that reading the pertinent waiver standard to exclude STBs with two-way capabilities was most consistent with the policy concerns animating its decision to adopt the low-cost, limited capability waiver standard. In particular, while providing two-way capabilities may enable Comcast to sell additional, high-margin services (such as video-on-demand) to formerly analog customers, they are clearly "not necessary to achieve the goal of enabling analog customers to continue to view programming as cable operators and broadcasters transition to digital." *Order*, para. 14 (J.A. 20).[33] And waiving the integration ban for devices used by a significant portion of Comcast's subscriber base would not advance "the overarching goal of establishing a competitive market for navigation devices." *Order*, para. 13 (J.A. 19); *see also id.*, para. 14 n.73 (J.A. 20) (crediting record evidence from the CE industry that granting waivers under the circumstances posited by Comcast "'would decrease

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[33] As the Commission noted (*Order*, para. 14 n.74 (J.A. 20)), in the analogous context of the statutorily mandated transition to digital broadcasting, the National Telecommunications and Information Administration administers a Coupon Progam to assist viewers in receiving over-the-air broadcast television programming when stations cease analog broadcasting on February 17, 2009. To qualify for the Coupon Program, a converter box must be "a stand-alone device that does not contain features or functions except those necessary to enable a consumer to convert any channel broadcast in the digital television service into a format that the consumer can display on television receivers designed to receive and display signals only in the analog television service." Title III of the Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4, 21 (February 8, 2006), § 3005(d).

today's CableCARD market base by an estimated thirty to forty percent, resulting in the concurrent loss of volume production benefits to consumers'") (quoting Sony Opposition, dated February 14, 2007, at 17 (J.A. 319)). Indeed, the damage to competition resulting from a grant of Comcast's broad waiver request would be particularly acute, given that, in the absence of a two-way plug and play agreement, competitive suppliers are largely shut out of the market for two-way devices. *See Order*, para. 9 (J.A. 16-17); *see also Bureau Order*, paras. 10-11 (J.A. 35-36).

Comcast's assertion that, for its own business reasons, it has "no interest" in deploying low-cost digital STBs with only one-way capabilities, Br. 27, does not compel acceptance of Comcast's broad reading of the *2005 Deferral Order*'s waiver standard. One-way analog boxes have existed for years, and, as the Commission noted, digital one-way boxes were technologically feasible and inexpensive to produce at the time the agency issued the *2005 Deferral Order*.[34] Those boxes have not entered the marketplace only because cable operators have not asked manufacturers to produce them. *Order*, para. 14 n.72 (J.A. 20).[35] But the reported feasibility of such devices at the time the Commission issued the *2005 Deferral Order*

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[34] *Order*, para. 14 n.72 (J.A. 20); *Bureau Order*, para. 26 n.97 (J.A. 42). *See also* Ken Kerschbaumer, *Cable Marches Toward an All-Digital Future*, Broadcasting & Cable (June 16, 2003) (reporting that Pace Micro could produce one-way single-tuner digital boxes costing $34.50 and have them on the market within nine months to a year after receiving orders from cable systems).

[35] Comcast alleges that there was never any consumer demand for such devices and that it would be irrational to order "'dumb' one-way STBs that no consumer wants." Br. 28. But such "dumb" devices would have provided consumers with access to more programming than current analog cable customers receive – and (if press reports are accurate, *see*, *supra*, n.34) they would have cost less than the two-way boxes for which Comcast sought a waiver. Comcast provides no evidence that it, or any other cable company, ever even test marketed such devices to assess demand.

rebuts Comcast's assertion that the Commission could not have meant to exclude STBs with two-way, interactive functions from the waiver standard announced in that order.

Comcast argues, finally, that it is impossible to reconcile the Commission's treatment of Comcast's waiver request under the *2005 Deferral Order* standard with the treatment accorded other MVPDs by the Commission's staff (Br. 28), and that the Commission ignored the allegedly "staggering consumer costs" associated with denial of the waiver (Br. 29-30). Both claims are misdirected. There is no plausible basis for Comcast's disparate treatment claim under the *2005 Deferral Order* standard, because neither the Commission nor its Media Bureau has ever granted any waiver under that standard. Moreover, although a balancing of costs and benefits was not an express component of the waiver standard adopted in the 2005 order, as discussed below, the Commission fully considered such factors in its assessment of Comcast's waiver request under the Commission's general waiver authority. *See Order*, para. 17 (J.A. 22-23).

The Commission properly concluded that Comcast was not entitled to a waiver under the standard announced in the *2005 Deferral Order*. Comcast has not met the heavy burden required for reversal of that determination. *BDPCS, Inc.*, 351 F.3d at 1181-82. [36]

III. THE COMMISSION PROPERLY DENIED COMCAST RELIEF UNDER ITS GENERAL WAIVER AUTHORITY

Under the Commission's general waiver authority, the agency may waive rules for "good cause" when the "public interest" so requires. 47 C.F.R. §§ 1.3 & 76.7(i). Comcast agrees with the Commission that "[t]his general waiver authority predates the specific waiver mandate of Section 629(c) and, when properly applied, provides a complementary basis for the FCC to grant waivers of its navigation device rules where the required public interest benefits and lack of countervailing harms are demonstrated." Br. 30. Comcast specifically asked for a waiver under these general rules, claiming that relief from the integration ban for specified STBs would generate public interest benefits by accelerating an orderly transition to digital cable service, spurring the development of a downloadable security solution and avoiding cost increases

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[36] Comcast asserts that the Commission promised the Court in its brief and at oral argument of the *Charter* case that Comcast's waiver petition was within the terms of the *2005 Deferral Order*, but in neither place did the Commission make such a promise. At most, Commission counsel at oral argument in *Charter* was informing the Court that industry participants such as Comcast had asked for waivers pursuant to the *2005 Deferral Order*; counsel never offered any view as to the merits of Comcast's application or, in particular, as to whether the boxes that were the subject of the waiver request in fact had limited capabilities. Similarly, the Commission's brief in *Charter* made no representations that any particular waiver request would be granted, but simply noted the Commission's pledge in the *2005 Deferral Order* to entertain requests in appropriate circumstances as a way to mitigate potential short-term costs. In any event, the Court in *Charter* gave no weight in its assessment of the benefits and burdens of the integration ban to the Commission's *2005 Deferral Order* commitment to entertain waiver requests for low-cost, limited capability STBs. *See Charter*, 460 F.3d at 42. Instead, when recounting the ways in which the Commission mitigated the costs of the ban, it cited only the Commission's extension of the deadline and its commitment to revisit the need for physical separation if downloadable security became feasible. *See id.*

associated with de-integrating security and navigation functions in STBs. *See Order*, paras. 16-17 (J.A. 21-23). Comcast claimed, further, that the integration ban with respect to these devices was not needed to ensure a competitive retail market for navigation equipment in light of existing regulations requiring cable operators to support CableCARD use in competitive devices. *Id.*, para. 16 (J.A. 21-22). Carefully balancing the alleged benefits and burdens associated with Comcast's request, however, the Commission concluded that grant of a waiver would not serve the public interest. *Id.*, para. 17 (J.A. 22-23).

Comcast argues that the Commission "simply ignored" the public interest benefits that allegedly would result from a grant of the waiver. Comcast Br. 31. Not so. As paragraph 17 of the *Order* (J.A. 22-23) makes clear, the Commission properly "weighed the potential public interest benefits of [the] waiver [request] against [its] potential harms," and concluded that the former were insufficient to overcome the latter. In particular, the Commission acknowledged potential short-term cost savings associated with integration and arguments that integrated devices might assist cable operators somewhat in the transition from analog to digital transmission. *Ibid.* (citing *2005 Deferral Order*, para. 29); *see also id.*, para. 17 n.88 (J.A. 23). But the Commission found no reason to depart from its conclusion in the *2005 Deferral Order* – affirmed by the Court in *Charter* – that "'[a]bsent common reliance on an identical security function, we do not foresee the market developing in a manner consistent with our statutory obligation.'" *Charter*, 460 F.3d at 41 (quoting *2005 Deferral Order*, para. 36); *see Order*, para. 17 (J.A. 22-23). Noting estimates in the record that the integrated STBs for which Comcast was seeking a waiver would already be in 20 percent of Comcast's digital subscribers' homes by the end of 2006,[37] and given Comcast's own stated intention to deploy millions more integrated

[37] *Order*, para. 17 (J.A. 22-23) (citing Microsoft Comments at 5 (June 15, 2006) (J.A. 152)).

devices in coming years if the waiver were granted,[38] the Commission concluded that the grant of Comcast's waiver request would lessen the relative importance of CableCARDs in Comcast's own offerings, thereby "substantially undermin[ing] the goals of common reliance." *Order*, para. 17 & n. 86 (J.A. 22-23).

Comcast argues that concerns about undermining common reliance are baseless because cable operators themselves now rely on CableCARDs for their high-end STBs, and, in any event, their support for CableCARDs is required by regulation. Comcast Br. 32. But there was ample reason in the record to believe that CableCARD usage limited to high-end products would not generate sufficient market incentives to support competitive products.[39] And the argument that the regulatory obligation itself will suffice is simply a reprise of the failed claims that the cable industry made in *Charter*. There the Court considered the argument that the integration ban was unnecessary because "the FCC's 'plug and play' rules legally bound the cable industry," 460 F.3d at 40 (internal quotations omitted), but found reasonable the Commission's conclusion that the economic incentives to support CableCARD use that result from common reliance were essential to creating a competitive market for competitive devices, *id.* at 41.

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[38] Comcast acknowledged the breadth of its waiver request when it said that grant of the waiver "will afford millions more Comcast customers access" to its programming, explained that it planned to "purchase between 1 million and 1.5 million DCT-700s"in 2006, and expected to "purchase comparable numbers of these devices (whether DCT-700, Explorer-940, or Pace Chicago set-top boxes) in subsequent years if the instant waiver is granted." Waiver Request at 10 (April 19, 2006) (J.A. 100).

[39] *See* CEA Comments at 4 (June 15, 2006) (J.A. 135) (Even without any waivers and with 100% support of CableCARDs by cable operators, "the installed base of embedded security converters, now numbering over 50 million, will far outweigh the number of any [cable operator's] Cable CARD-reliant products for years to come. If, in addition, the [cable operator's] CableCARD products do not predominate in the *new* installations, * * * they will be viewed by local operators as 'specialty' items, much as competitive CableCARD-reliant products are today. This can make a huge difference in the operational status of CableCARD-reliant products that are purchased at retail.") (emphasis added).

Comcast also asserts that waiving the integration ban for the subject STBs will not impair the marketplace for competitive navigation equipment because consumer electronics manufacturers do not even manufacture such low-end boxes. Br. 31. But the record provided ample basis to reject this claim. Sony noted, for instance, that "in the consumer electronics industry, as in many others, new technologies get introduced in high-end products first" and then "filter down into lower-cost devices as manufacturers realize economies of scope and scale."[40] Moreover, Pioneer North America and Sony said that they would market low-cost devices if they were able to offer them with the two-way capabilities that – in the absence of a two-way plug and play agreement – currently are available only from the cable operator.[41] Allowing Comcast to increase its embedded base of such devices under circumstances in which competition is not possible would not serve the competitive purposes of section 629.

Comcast also argues that denying its waiver request while DBS providers and recipients of staff waivers are exempt from the integration ban with respect to the subject STBs has "dramatically skewed competition in the MVPD marketplace." Br. 38; *see also* NCTA Br. 26-28. In making this argument, Comcast yet again fails to cite *Charter*, in which this Court affirmed the Commission's treatment of DBS against essentially identical claims by the cable industry. 460 F.3d at 43-44. And Comcast provided nothing beyond bare allegation to support its claim with respect to the staff waiver recipients, most of which do not compete directly with

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[40] Letter from Jim Morgan, Sony Electronics, Inc., to FCC Secretary, at 2 (August 11, 2006) (J.A. 234).

[41] *See* Letter from Adam Goldberg, Pioneer North America, Inc., to FCC Secretary, at 1 (August 24, 2006) (J.A. 240); Letter from Jim Morgan, Sony Electronics, Inc., to FCC Secretary, at 1-2 (August 11, 2006) (J.A. 233-34); Letter from Jim Morgan, Sony Electronics, to FCC Secretary, at 7-8 (August 4, 2006) (J.A. 226-27).

Comcast and which, in all events, have *de minimis* market shares relative to Comcast.[42] This Comcast waiver proceeding (CSR-7012-Z) – limited to Comcast's request and the comments addressing it – thus provided no record basis upon which to accept Comcast's "skewed competition" claim. *See Charter*, 460 F.3d at 43. In any event, if Comcast were truly concerned about "skewed competition" resulting from the grant of waivers to other companies by the staff, it would have asked the Commission to reverse them. It did not.

Comcast cannot establish that the Commission's weighing of the public interest benefits and burdens with respect to its waiver request was "so insubstantial as to render the denial an abuse of discretion." *BDPCS, Inc.*, 351 F.3d at 1181-82 (internal quotation omitted).

IV. THERE IS NO INCONSISTENCY IN THE FCC's APPLICATION OF WAIVER POLICY REGARDING STBs

At numerous points in its brief (Br. 22, 24-25, 28, 32-37), Comcast alleges that the Commission's denial of its waiver request was inconsistent with Commission staff's treatment of waiver requests by other providers of multichannel video programming. *See also* NCTA Br. 24-26, 28-30. Indeed, Comcast's brief is in substantial part an exercise in distraction, effectively seeking Court review of staff-level decisions that Comcast itself never asked the full Commission to overturn and that are not before this Court. This effort suffers from threshold legal defects and, in any event, fails on the facts.

As an initial matter, Comcast's disparate treatment claim is plainly inapplicable to its request for waivers under section 629(c) and the *2005 Deferral Order*. The Commission has

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[42] Verizon, which Comcast cites as a "primary" direct competitor (Br. 38), had just over 700,000 subscribers nationwide at the end of the third quarter of 2007, compared with Comcast's subcriber base of over 24 million. *See* Press Release, Verizon, "Verizon Plans Fivefold Increase in HD Channels on FiOS TV in 2008" (November 1, 2007), *available at* http://investor.verizon.com/news/view/aspx?NewsID=865.

never granted a waiver of the integration ban or related separated security rules under section 629(c), and the agency's staff has granted waivers under that standard only twice – both times involving unopposed applications that were ruled upon before the current July 2007 implementation date was established in the *2005 Deferral Order*.[43] Similarly, neither the Commission nor the staff has ever granted a waiver of the integration ban under the low-cost, limited capability STB standard of the *2005 Deferral Order*. Accordingly, there is no plausible basis for Comcast to suggest that the Commission's denial of its waiver request under those two standards is discriminatory or inconsistent with agency precedent.

Nor has Comcast established any arbitrary disparate treatment of its waiver request under the Commission's general waiver authority. As discussed above (at Argument III), applying the well-established general waiver standard set out in its rules, the Commission concluded that the alleged public interest benefits of a waiver for Comcast were outweighed by the potential harms. *See Order*, paras. 16-20 (J.A. 21-25). This was the Commission's first and – to this point – only application of its general waiver authority to a request for waiver from the integration ban.

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[43] In *BellSouth Interactive Media Services, LLC*, 19 FCC Rcd 15607 (Media Bur. 2004) ("*BellSouth*"), the Media Bureau granted BellSouth an unopposed waiver of plug and play rules that required digital cable systems to support one-way digital cable-ready products by making CableCARDs available and by complying with various technical requirements governing the interfaces between CableCARDs and the host devices. *See* 47 C.F.R. § 76.640. The BellSouth system, which had only 40,000 subscribers at the time, was constructed on the basis of technical specifications that were incompatible with the plug and play rules, and the Bureau found that implementing the changes required for compliance would have posed a "virtually insurmountable burden and expense" and that, absent a waiver, the BellSouth system at issue potentially would be "eliminat[ed] [as] a competitor" in the MVPD marketplace. *BellSouth*, paras. 4, 8. *See also Bureau Order*, paras. 22-23 (J.A. 40-41). Similarly, the Media Bureau, in *Cox Communications Inc.*, 19 FCC Rcd 13054 (para. 4) (Media Bur. 2004), granted Cox an unopposed six-month waiver of plug and play CableCARD support requirements for portions of its network serving about 2,000 subscribers in order to accommodate a system consolidation.

There is simply no other Commission-level decision with which it could have been inconsistent. That simple fact is fatal to Comcast's disparate treatment claim.

In order to prevail on a theory of disparate treatment, a petitioner must show that the *Commission itself* has engaged in such behavior. Here, even assuming the truth of its allegations, Comcast has shown at most that the Commission has ruled on a waiver application in a manner different from that used by its subordinate operating division, the Media Bureau, in addressing similar requests from other companies. Any such alleged discrepancy is not legally actionable. "[E]ven if these [Bureau decisions] were found to evince internal inconsistency at a subordinate level, the Commission itself would not be acting inconsistently" when its ruling differed from the Bureau's. *Amor Family Broadcasting Group v. FCC*, 918 F.2d at 962. *See also Order*, para. 20 n.99 (J.A. 25) (citing *Amor Family Broadcasting*).

Citing *Northampton Media Associates v. FCC*, 941 F.2d 1214, 1216-17 (D.C. Cir. 1991), Comcast contends that the *Amor Family Broadcasting* ruling was *dicta* and applied only to circumstances in which the allegedly inconsistent staff action post-dated the Commission decision on review. Br. 40. However, this Court's decisions subsequent to *Northampton Media Associates* (which Comcast does not cite) confirm that the rule articulated in *Amor Family Broadcasting* remains the law of this Circuit. In *MacLeod v. ICC*, 54 F.3d 888 – a waiver denial case, like this one – this Court rejected the petitioner's claim that the agency had departed unreasonably from staff decisions granting waivers "both before and after" the decision on review. 54 F.3d at 891. Reiterating the stringent review standard in waiver denial cases, which compels affirmance of the agency unless its reasons are "so insubstantial as to render [the] denial an abuse of discretion," the Court stated that "the positions of an agency's staff do not preclude the agency from subsequently reaching its own conclusion." *Ibid.* (internal quotations omitted).

"Therefore," the Court stressed, "the results reached by the staff in the earlier decisions are *irrelevant* to our analysis of the Commission's fidelity to its own precedents." *Ibid.* (emphasis added) (citing *Amor Family Broadcasting*). *See also Vernal Enterprises, Inc. v. FCC*, 355 F.3d 650, 660 (D.C. Cir. 2004) ("an agency is not bound by the actions of its staff if the agency has not endorsed those actions").[44]

The holdings of *Amor Family Broadcasting* and cases affirming it are unaffected by the rule that staff decisions "'have the same force and effect, and shall be made, evidenced, and enforced in the same manner, as orders, decisions, reports, or other actions of the Commission.'" Br. 39 (quoting 47 U.S.C. § 155(c)(3)). Staff decisions are legally enforceable on the parties involved; they would be virtually meaningless if that were not the case. That does not mean, however, that the five-member Commission is obligated to adhere to those staff decisions – or to attempt somehow to vacate them long after the period for review has expired before it can come to a different result in a different case.[45] Indeed, such a rule would turn the Commission's staff into the proverbial tail wagging the dog.

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[44] Even if *Northampton Media Associates* remained good law, it would require only that the Commission "note and explain its divergence" from the allegedly inconsistent staff decisions. 941 F.2d at 1217. The Commission did so in the *Order* when it explained that "each of the staff decisions about which Comcast complains involved a company that was not similarly situated to Comcast." *Order*, para. 20 n.99 (J.A. 25) (citing Desai Letter (J.A. 365-71)).

[45] To the extent that Comcast believes that the precedent established by the Commission's *Order* denying its waiver request necessitates the beginning of proceedings to revoke staff waivers that have been granted to other MVPDs, it is of course free to file such a petition with the Commission. It has not done so. Neither did it oppose such waiver requests before they were granted by the staff, or ask the Commission to review the granting of those waivers.

In sum, because the Commission itself has not ruled on a set-top box waiver in any case other than Comcast's, Comcast cannot point to any Commission-level inconsistency that could form the basis for reversible error.[46]

In any event, even if this Court's precedent permitted Comcast to establish a claim of disparate treatment between the Commission and its staff, its argument would fail. A challenge predicated upon alleged disparate treatment must establish that the parties in question are in fact similarly situated. *See Mobile Relay Assocs. v. FCC*, 457 F.3d 1, 8-11 (D.C. Cir. 2006). As the Commission found, however, "each of the staff decisions about which Comcast complains involved a company that was not similarly situated to Comcast," including, for example, companies that "committed to operate all-digital networks no later than February 17, 2009," companies that "utilized technologies for which non-integrated HD or DVR devices have yet to be developed," and companies that had "demonstrated unique financial hardship." *Order*, para. 20 n.99 (J.A. 25) (citing, *e.g.*, Letter, dated September 4, 2007, from Monica Desai, Chief, Media Bureau, to Jonathan Friedman, counsel for Comcast, at 4-6 (J.A. 368-70)). Indeed, Comcast effectively concedes that, in pertinent respects, it is not similarly situated to the providers whose waiver requests were granted – noting that "none" of the staff decisions in those cases "is of any practical benefit to Comcast." Br. 35; *see also id.* 35-36.

Comcast nevertheless contends that, given the congressional objectives underlying section 629(c), the only relevant point of comparison between its waiver request and those which

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[46] Comcast claims support for its disparate treatment argument in the separate joint statement of Commissioners McDowell and Adelstein. Br. 10-11, 15, 33. The Commission, however, was unanimous in its decision to deny Comcast's petition. Commissioners McDowell and Adelstein were not at all critical of the denial of Comcast's waiver request – which they voted for – but instead were concerned about waiver grants by the staff.

the staff granted is the set-top box at issue. Br. 33. Comcast asserts that unreasonably discriminatory treatment is established by the fact that many of the granted waivers involved the "*exact same* STB" (or similar STBs) for which Comcast sought a waiver. Br. 32. That assertion is incorrect. Even if exclusive focus on the set-top box were required under the separate standards of the *2005 Deferral Order* and section 629(c) (and it is hardly clear under the latter),[47] no waivers were granted under either of those standards. And such narrow focus on the STB clearly is not mandated under the Commission's general waiver authority, which Comcast itself asked the Commission to apply and which it acknowledges provides a separate basis for waiver of the integration ban. Br. 1, 30. The general waiver authority requires examination of all relevant factual circumstances, including those unique to the waiver applicant. *See WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969) (in deciding whether to grant a waiver, the agency may "take into account considerations of hardship, equity, or more effective implementation of overall policy").

[47] The staff's *BellSouth* and *Cox* waiver orders from 2004, which Comcast otherwise touts in support of its challenge (Br. 22), granted waivers under section 629(c) that were limited to the particular providers that requested them.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for review.

Respectfully submitted,

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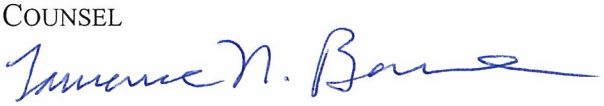

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February 29, 2008

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

COMCAST CORPORATION PETITIONER, V. FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA RESPONDENTS.	)	NO. 07-1445

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying "Brief for Respondents" in the captioned case contains 13624 words.

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February 29, 2008

ADDENDUM

C

Effective: October 6, 2006

United States Code Annotated Currentness
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part VI. Particular Proceedings
Chapter 158. Orders of Federal Agencies; Review (Refs & Annos)
§ 2342. Jurisdiction of court of appeals

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of--

(1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47;

(2) all final orders of the Secretary of Agriculture made under chapters 9 and 20A of title 7, except orders issued under sections 210(e), 217a, and 499g(a) of title 7;

(3) all rules, regulations, or final orders of--

(A) the Secretary of Transportation issued pursuant to section 50501, 50502, 56101-56104, or 57109 of title 46 or pursuant to part B or C of subtitle IV, subchapter III of chapter 311, chapter 313, or chapter 315 of title 49; and

(B) the Federal Maritime Commission issued pursuant to section 305, 41304, 41308, or 41309 or chapter 421 or 441 of title 46;

(4) all final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42;

(5) all rules, regulations, or final orders of the Surface Transportation Board made reviewable by section 2321 of this title;

(6) all final orders under section 812 of the Fair Housing Act; and

(7) all final agency actions described in section 20114(c) of title 49.

Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.

CREDIT(S)

(Added Pub.L. 89-554, § 4(e), Sept. 6, 1966, 80 Stat. 622, and amended Pub.L. 93-584, § 4, Jan. 2, 1975, 88 Stat. 1917; Pub.L. 95-454, Title II, § 206, Oct. 13, 1978, 92 Stat. 1144; Pub.L. 96-454, § 8(b)(2), Oct. 15, 1980, 94 Stat. 2021; Pub.L. 97-164, Title I, § 137, Apr. 2, 1982, 96 Stat. 41; Pub.L. 98-554, Title II, § 227(a)(4), Oct. 30, 1984, 98 Stat. 2852; Pub.L. 99-336, § 5(a), June 19, 1986, 100 Stat. 638; Pub.L. 100-430, § 11(a), Sept. 13, 1988, 102 Stat. 1635; Pub.L. 102-365, § 5(c)(2), Sept. 3, 1992, 106 Stat. 975; Pub.L. 103-272, § 5(h), July 5, 1994, 108 Stat. 1375; Pub.L. 104-88, Title III, § 305(d)(5) to (8), Dec. 29, 1995, 109 Stat. 945; Pub.L. 104-287, § 6(f)(2), Oct. 11, 1996, 110 Stat. 3399; Pub.L. 109-59, Title IV, § 4125(a), Aug. 10, 2005, 119 Stat. 1738; Pub.L. 109-304, § 17(f)(3), Oct. 6, 2006, 120 Stat. 1708.)

1996 Acts. Section 6(f) of Pub.L. 104-287 provided in part that amendments made by such section 6(f) to this section, sections 744 and 797*l* of Title 45, Railroads, and section 30166 of Title 49, Transportation, were effective Dec. 29, 1995.

Current through P.L. 110-176 (excluding P.L. 110-140, 110-149, 110-161, and 110-172 to 110-174) approved 1-4-08

C

Effective: February 8, 1996

United States Code Annotated Currentness
Title 47. Telegraphs, Telephones, and Radiotelegraphs
Chapter 5. Wire or Radio Communication (Refs & Annos)
Subchapter IV. Procedural and Administrative Provisions
§ 402. Judicial review of Commission's orders and decisions

(a) Procedure

Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28.

(b) Right to appeal

Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit or station license, whose application is denied by the Commission.

(2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.

(3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.

(4) By any applicant for the permit required by section 325 of this title whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.

(5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.

(6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1), (2), (3), (4), and (9) of this subsection.

(7) By any person upon whom an order to cease and desist has been served under section 312 of this title.

(8) By any radio operator whose license has been suspended by the Commission.

(9) By any applicant for authority to provide interLATA services under section 271 of this title whose application is denied by the Commission.

(c) Filing notice of appeal; contents; jurisdiction; temporary orders

Such appeal shall be taken by filing a notice of appeal with the court within thirty days from the date upon which public notice is given of the decision or order complained of. Such notice of appeal shall contain a concise statement of the nature of the proceedings as to which the appeal is taken; a concise statement of the reasons on which the appellant intends to rely, separately stated and numbered; and proof of service of a true copy of said notice and statement upon the Commission. Upon filing of such notice, the court shall have jurisdiction of the proceedings and of the questions determined therein and shall have power, by order, directed to the Commission or any other party to the appeal, to grant such temporary relief as it may deem just and proper. Orders granting temporary relief may be either affirmative or negative in their scope and application so as to permit either the maintenance of the status quo in the matter in which the appeal is taken or the restoration of a position or status terminated or adversely affected by the order appealed from and shall, unless otherwise ordered by the court, be effective pending hearing and determination of said appeal and compliance by the Commission with the final judgment of the court rendered in said appeal.

(d) Notice to interested parties; filing of record

Upon the filing of any such notice of appeal the appellant shall, not later than five days after the filing of such notice, notify each person shown by the records of the Commission to be interested in said appeal of the filing and pendency of the same. The Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28.

(e) Intervention

Within thirty days after the filing of any such appeal any interested person may intervene and participate in the proceedings had upon said appeal by filing with the court a notice of intention to intervene and a verified statement showing the nature of the interest of such party, together with proof of service of true copies of said notice and statement, both upon appellant and upon the Commission. Any person who would be aggrieved or whose interest would be adversely affected by a reversal or modification of the order of the Commission complained of shall be considered an interested party.

(f) Records and briefs

The record and briefs upon which any such appeal shall be heard and determined by the court shall contain such information and material, and shall be prepared within such time and in such manner as the court may by rule prescribe.

(g) Time of hearing; procedure

The court shall hear and determine the appeal upon the record before it in the manner prescribed by section 706 of Title 5.

(h) Remand

In the event that the court shall render a decision and enter an order reversing the order of the Commission, it shall remand the case to the Commission to carry out the judgment of the court and it shall be the duty of the Commission, in the absence of the proceedings to review such judgment, to forthwith give effect thereto, and unless otherwise ordered by the court, to do so upon the basis of the proceedings already had and the record upon which said appeal was heard and determined.

(i) Judgment for costs

The court may, in its discretion, enter judgment for costs in favor of or against an appellant, or other interested parties intervening in said appeal, but not against the Commission, depending upon the nature of the issues involved upon said appeal and the outcome thereof.

(j) Finality of decision; review by Supreme Court

The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 1254 of Title 28, by the appellant, by the Commission, or by any interested party intervening in the appeal, or by certification by the court pursuant to the provisions of that section.

CREDIT(S)

(June 19, 1934, c. 652, Title IV, § 402, 48 Stat. 1093; May 20, 1937, c. 229, §§ 11-13, 50 Stat. 197; May 24, 1949, c. 139, § 132, 63 Stat. 108; July 16, 1952, c. 879, § 14, 66 Stat. 718; Aug. 28, 1958, Pub.L. 85-791, § 12, 72 Stat. 945; Sept. 13, 1982, Pub. L. 97-259, Title I, §§ 121, 127(b), 96 Stat. 1097, 1099; Nov. 8, 1984, Pub.L. 98-620, Title IV, § 402(50) 98 Stat. 3361; Feb. 8, 1996, Pub.L. 104-104, Title I, § 151(b), 110 Stat. 107.)

Current through P.L. 110-176 (excluding P.L. 110-140, 110-149, 110-161, and 110-172 to 110-174) approved 1-4-08

END OF DOCUMENT

C

Effective:[See Text Amendments]

United States Code Annotated Currentness
Title 47. Telegraphs, Telephones, and Radiotelegraphs
Chapter 5. Wire or Radio Communication (Refs & Annos)
Subchapter IV. Procedural and Administrative Provisions

§ 405. Petition for reconsideration; procedure; disposition; time of filing; additional evidence; time for disposition of petition for reconsideration of order concluding hearing or investigation; appeal of order

(a) After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 155(c)(1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(c)(1) of this title, in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear. A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for reconsideration or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: *Provided,* That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Reconsiderations shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any reconsideration. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under section 402(b) of this title in any case, shall be computed from the date upon which the Commission gives public notice of the order, decision, report, or action complained of.

(b)(1) Within 90 days after receiving a petition for reconsideration of an order concluding a hearing under section 204(a) of this title or concluding an investigation under section 208(b) of this title, the Commission shall issue an order granting or denying such petition.

(2) Any order issued under paragraph (1) shall be a final order and may be appealed under section 402(a) of this title.

Public Law 109–171
109th Congress

An Act

Feb. 8, 2006
[S. 1932]

To provide for reconciliation pursuant to section 202(a) of the concurrent resolution on the budget for fiscal year 2006 (H. Con. Res. 95).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Deficit Reduction Act of 2005. 42 USC 1305 note.

SECTION 1. SHORT TITLE.

This Act may be cited as the "Deficit Reduction Act of 2005".

SEC. 2. TABLE OF TITLES.

The table of titles is as follows:

TITLE I—AGRICULTURE PROVISIONS

Agricultural Reconciliation Act of 2005. 7 USC 7901 note.

SECTION 1001. SHORT TITLE.

This title may be cited as the "Agricultural Reconciliation Act of 2005".

Subtitle A—Commodity Programs

SEC. 1101. NATIONAL DAIRY MARKET LOSS PAYMENTS.

Effective dates.

(a) AMOUNT.—Section 1502(c) of the Farm Security and Rural Investment Act of 2002 (7 U.S.C. 7982(c)) is amended by striking paragraph (3) and inserting the following new paragraph:

"(3)(A) during the period beginning on the first day of the month the producers on a dairy farm enter into a contract under this section and ending on September 30, 2005, 45 percent;

"(B) during the period beginning on October 1, 2005, and ending on August 31, 2007, 34 percent; and

use of a competitive bidding system under this subsection with respect to recovered analog spectrum shall be deposited in the Digital Television Transition and Public Safety Fund.

"(iii) TRANSFER OF AMOUNT TO TREASURY.—On September 30, 2009, the Secretary shall transfer $7,363,000,000 from the Digital Television Transition and Public Safety Fund to the general fund of the Treasury.

"(iv) RECOVERED ANALOG SPECTRUM.—For purposes of clause (i), the term 'recovered analog spectrum' has the meaning provided in paragraph (15)(C)(vi).".

SEC. 3005. DIGITAL-TO-ANALOG CONVERTER BOX PROGRAM.

(a) CREATION OF PROGRAM.—The Assistant Secretary shall—

(1) implement and administer a program through which households in the United States may obtain coupons that can be applied toward the purchase of digital-to-analog converter boxes; and

(2) make payments of not to exceed $990,000,000, in the aggregate, through fiscal year 2009 to carry out that program from the Digital Television Transition and Public Safety Fund established under section 309(j)(8)(E) of the Communications Act of 1934 (47 U.S.C. 309(j)(8)(E)).

(b) CREDIT.—The Assistant Secretary may borrow from the Treasury beginning on October 1, 2006, such sums as may be necessary, but not to exceed $1,500,000,000, to implement this section. The Assistant Secretary shall reimburse the Treasury, without interest, as funds are deposited into the Digital Television Transition and Public Safety Fund. Effective date.

(c) PROGRAM SPECIFICATIONS.—

(1) LIMITATIONS.—

(A) TWO-PER-HOUSEHOLD MAXIMUM.—A household may obtain coupons by making a request as required by the regulations under this section between January 1, 2008, and March 31, 2009, inclusive. The Assistant Secretary shall ensure that each requesting household receives, via the United States Postal Service, no more than two coupons.

(B) NO COMBINATIONS OF COUPONS.—Two coupons may not be used in combination toward the purchase of a single digital-to-analog converter box.

(C) DURATION.—All coupons shall expire 3 months after issuance.

(2) DISTRIBUTION OF COUPONS.—The Assistant Secretary shall expend not more than $100,000,000 on administrative expenses and shall ensure that the sum of—

(A) all administrative expenses for the program, including not more than $5,000,000 for consumer education concerning the digital television transition and the availability of the digital-to-analog converter box program; and

(B) the total maximum value of all the coupons redeemed, and issued but not expired, does not exceed $990,000,000.

(3) USE OF ADDITIONAL AMOUNT.—If the Assistant Secretary transmits to the Committee on Energy and Commerce of the House of Representatives and Committee on Commerce,

Science, and Transportation of the Senate a statement certifying that the sum permitted to be expended under paragraph (2) will be insufficient to fulfill the requests for coupons from eligible households—

Applicability.

(A) paragraph (2) shall be applied—

(i) by substituting "$160,000,000" for "$100,000,000"; and

(ii) by substituting "$1,500,000,000" for "$990,000,000";

(B) subsection (a)(2) shall be applied by substituting "$1,500,000,000" for "$990,000,000"; and

Deadline.

(C) the additional amount permitted to be expended shall be available 60 days after the Assistant Secretary sends such statement.

(4) COUPON VALUE.—The value of each coupon shall be $40.

(d) DEFINITION OF DIGITAL-TO-ANALOG CONVERTER BOX.—For purposes of this section, the term "digital-to-analog converter box" means a stand-alone device that does not contain features or functions except those necessary to enable a consumer to convert any channel broadcast in the digital television service into a format that the consumer can display on television receivers designed to receive and display signals only in the analog television service, but may also include a remote control device.

SEC. 3006. PUBLIC SAFETY INTEROPERABLE COMMUNICATIONS.

(a) CREATION OF PROGRAM.—The Assistant Secretary, in consultation with the Secretary of the Department of Homeland Security—

(1) may take such administrative action as is necessary to establish and implement a grant program to assist public safety agencies in the acquisition of, deployment of, or training for the use of interoperable communications systems that utilize, or enable interoperability with communications systems that can utilize, reallocated public safety spectrum for radio communication; and

(2) shall make payments of not to exceed $1,000,000,000, in the aggregate, through fiscal year 2010 to carry out that program from the Digital Television Transition and Public Safety Fund established under section 309(j)(8)(E) of the Communications Act of 1934 (47 U.S.C. 309(j)(8)(E)).

Effective date.

(b) CREDIT.—The Assistant Secretary may borrow from the Treasury beginning on October 1, 2006, such sums as may be necessary, but not to exceed $1,000,000,000, to implement this section. The Assistant Secretary shall reimburse the Treasury, without interest, as funds are deposited into the Digital Television Transition and Public Safety Fund.

(c) CONDITION OF GRANTS.—In order to obtain a grant under the grant program, a public safety agency shall agree to provide, from non-Federal sources, not less than 20 percent of the costs of acquiring and deploying the interoperable communications systems funded under the grant program.

(d) DEFINITIONS.—For purposes of this section:

(1) PUBLIC SAFETY AGENCY.—The term "public safety agency" means any State, local, or tribal government entity, or nongovernmental organization authorized by such entity,

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Carriage of Digital Television Broadcast	)	CS Docket No. 98-120
Signals: Amendment to Part 76 of the	)	
Commission's Rules	)	

COMMENTS OF THE

NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

William Check, Ph.D
SVP, Science & Technology

Andy Scott
Vice President, Engineering

July 16, 2007

Daniel L. Brenner
Michael S. Schooler
Diane B. Burstein
National Cable & Telecommunications Association
25 Massachusetts Avenue, N.W. – Suite 100
Washington, D.C. 20001-1431

The broadcasters' transition to digital television, without careful planning, has the potential to seriously disrupt the viewing habits of over-the-air households. Recognizing this, the cable industry stepped up, as a public service, to work with a variety of organizations, including broadcaster and other groups, to ensure that American consumers are as prepared as possible for a smooth broadcast digital transition. The transition should also be as easy as possible for cable homes. The Commission should not throw sand into the gears of this transition by piling new, unnecessary and unconstitutional burdens on cable operators in the last few months leading up to February 17, 2009.

While the discussion below explains why we have serious concerns about the statutory and constitutional bases for mandates along the lines of what the *Notice* has proposed, we have repeatedly made clear that our industry is committed to making the transition as seamless as possible for our customers. Thus, as we did in 2005 in working with Congress on a bipartisan basis on the digital transition legislation, we will continue to explore with the Commission and leaders of Congress how the cable industry might help provide voluntary solutions to the challenges posed by the transition.

DISCUSSION

I. THE COMMISSION CANNOT REQUIRE DUAL CARRIAGE OF A MUST-CARRY STATION

A. The Notice Proposes Dual Carriage

The *Notice* proposes that after broadcasters have returned their analog spectrum and transmit only a digital primary signal, a cable operator "must either: (1) carry the signals of commercial and non-commercial must-carry stations in analog format to all analog cable subscribers, or (2) for all-digital systems, carry those signals only in digital format, provided that all subscribers with analog television sets have the necessary equipment to view the broadcast

content. This requirement would be *in addition to* the requirement that the cable operator pass through the HD signal to cable subscribers of an HD package..."[1] While the *Notice* does not show the simple math, we will do so here: one signal in HD, plus one in analog, equals two signals. This is a dual carriage obligation.[2]

The purported "option" in the *Notice* is a fantasy. Cable operators would be permitted to carry a single version of a digital must-carry broadcast signal only if a system is "all-digital" and "all subscribers with analog television sets have the necessary equipment to view the broadcast content."[3] While "all-digital" is not defined,[4] it seems that the Commission contemplates that to qualify under this option a cable system would no longer be permitted to provide any analog service. However, of the 7,000 cable systems in the United States, there is at most a handful of which we are aware that would meet this standard anytime soon.

The reasons why are obvious. Cable operators have been offering digital tiers for years. They have been aggressively marketing those tiers to customers, working to induce them to adopt digital. Digital video recorders, video on demand, digital programming tiers: these are all services that customers could enjoy on analog television sets with the addition of a digital box. Cable operators have every incentive to move customers to digital.

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1 *Notice* at ¶ 17 (emphasis supplied).

2 The *Notice* does not address whether cable operators would be required to carry a *standard definition* must-carry signal in an analog format, too. However, the implication of the *Notice* is that dual carriage would also be required in that circumstance.

3 *Notice* at ¶ 17.

4 Sometimes, cable systems are considered "all-digital" when they simulcast a standard definition digital version of the analog tier of service. This digital simulcast, however, is not the same thing as a digital-only system. Only in the latter case would there be no tier of analog service so that all customers would be required to lease or purchase a converter device in order to view digital signals on an analog television set.

But even with all these efforts and attractive offerings, millions of cable customers choose to remain analog-only households. Digital subscribership varies from system to system. Overall, only a little over half of cable customers subscribe to the digital tier of service. And even those digital households typically have one or more additional television sets that receive only the analog tier of service. To move to a "digital-only" system, then, would require customers to be equipped with digital-to-analog set-top devices for the 126 million analog sets projected to be in cable customers' homes in 2009.[5] At a cost of $50 per set-top, even for the most basic converter box, that amounts to a $6.3 billion price tag for the industry – and ultimately for consumers.

In 2006, Congress decided that there are policy reasons, wholly apart from the gradual consumer acceptance of digital television technology, to set a firm date by which over-the-air customers must be forced to move to digital. Congress abandoned a "market transition" based on an 85 percent digital deployment test and set a hard cut-off date. The hard date provides for the more rapid reallocation of analog broadcast frequencies for other uses, including public safety. And it allows broadcasters to eliminate the costs of maintaining and powering two transmitters. The hard date for over-the-air viewers thus will proceed on one timetable unrelated to the deployment of digital TV sets in their homes. But it does not follow that cable subscribers are any more ready for all-digital TV than under the previous assumptions of the 85 percent test.

An operator's decision to go "all-digital" on any particular system has significant ramifications beyond those associated with avoiding a "dual carriage" obligation. Operators may make this choice based on the unique facts and circumstances of each system, including the percentage of digital versus analog customers. But it would be arbitrary and capricious for the

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[5] Based on NCTA estimates of digital set-top box deployment, using Kagan data.

FCC to use this rulemaking as a way to push cable operators to go "all-digital" when there otherwise is no reason to do so.

There is no such compelling government purpose to set firm deadlines for the digital transition for cable customers. It should proceed at its own pace, as consumer interest and wise business practices direct. It makes no sense for the FCC to force a cable operator to move to all-digital on a wholly artificial timetable. And it makes even less sense for the agency to suggest that operators must eliminate the analog tier, forcing cable customers to obtain set-top boxes for their analog television sets.

In short, a digital cut-over *is* a necessity for over-the-air viewers if spectrum is to be available for other purposes. A digital cut-over is *not* a necessity for cable customers and will impose titanic costs on them, all because of the *Notice's* erroneous view of what the must-carry statute requires.

B. The Cable Act Does Not Compel Dual Carriage; And Operators Will Make the Transition Work for Their Customers

At bottom, then, the *Notice* gives cable operators only one choice – forced carriage of each digital broadcast signal in a digital format and a second channel with the same signal translated into analog. This is mandatory dual carriage. And mandatory dual carriage has twice been solidly rejected by a unanimous Commission.

The Cable Act does not compel dual carriage. There is only one way to read the Act – to require carriage of a broadcaster's primary video signal, post-transition, in *one* format. Section 614 nowhere suggests that cable operators should be forced to carry signals from television stations in a format other than the one in which it is transmitted over-the-air.

The Commission in this *Notice* and elsewhere has consistently said that this means, post-transition, that a cable operator must retransmit the broadcaster's digital signal in a digital

97-80
00-267
STAMP AND RETURN

December 19,2002

The Honorable Michael K. Powell
Chairman
Federal Communications Commission
445 12th Street, SW
Room 8-B201
Washington, D.C. 20554

Re: Consensus Cable MSO-Consumer Electronics Industry Agreement on "Plug & Play" Cable Compatibility and Related Issues.

'DearChairman Powell:

We are pleased to report to you today that major cable and consumer electronics companies have reached agreement on a package of joint recommendations to the Commission and agreements on critical technical, legal, and industry issues, to assure and expedite the deployment of a national "plug and play" digital television (DTV) cable standard. When implemented, this agreement will provide the certainty the cable and CE industries need to build products and develop services to spur the digital transition, while preserving the ability of both industries to create innovative products and services on a timely basis in the rapidly-changing digital environment. The parties' agreements are reflected in the attached Memorandum of Understanding.

Assuming implementation of this package, consumers will have the ability to access scrambled digital cable television channels (as well as unscrambled digital and analog channels) through future digital cable-compatibleDTV and HDTV receivers on a nationally portable basis, without the use of a cable set-top box. Our agreement also calls for a phase-in schedule for digital connectors on DTV receivers to assure secure connectivity to advanced interactive set-top boxes.

We have also committed to continue working together, expeditiously, toward development of a similar package providing for future product compatibility with "advanced interactive" digital cable services, and we intend to hold our first meeting on these issues in January 2003. Those agreements will enable support for "plug and play" consumer electronics products, including DTV and HDTV receivers, with additional, interactive features and services such as access to the cable operator's enhanced electronic program guide, video-on-demand and "impulse" pay-per-view services, also without need of a cable set-top box.

"Plug and play" is the short-hand term applied to "integrated" DTV products such as DTV sets with cable set-top functionality included in the set. In recent remarks you described this as one of the remaining challenges to the successful migration from analog to digital television -- the DTV transition. You have observed that the "basic technical standards are now largely complete" for such integrated DTV products, and noted that the "cable and CE industries are working to resolve remaining business issues, and they are making significant progress." Our

agreement, embracing a range of regulatory recommendations and private sector technical, licensing, and customer support regimes, should put us on a clear path and schedule to meeting this challenge.

With the encouragement of Commission officials such as yourself, the other Commissioners, Media Bureau Chief Ferree, DTV Task Force Chair Chessen and other Commission staff, as well as Congressional leaders such as Chairman Tauzin, Chairman Upton and Ranking Members Dingell and Markey and their staffs and Senators McCain and Hollings, senior executives of cable multiple system operators ("MSOs") and consumer electronics ("CE") manufacturers have engaged in five months of extensive negotiations to resolve questions and concerns regarding the interoperability of cable systems and consumer electronics equipment, particularly (but not exclusively) DTV receivers with integrated set-top functionality.

You have described some of the key issues that needed resolution as "business" issues. We share your belief that voluntary inter-industry commercial agreements are generally preferable to government regulation. Therefore, our voluntary, private sector agreements about standards, testing, interoperability, and consumer support are at the core of our "package." These agreements, however, assume and depend upon implementation by the Commission of certain regulations that we recommend. Accordingly, we have drafted and enclosed a set of documents that include draft regulations. Clearly these are in the Commission'spurview. However, we consider the joint agreements embodied in these recommendations for regulations to be essential elements of the mutual understandings we have achieved.

The enclosed documents includejointly recommended draft regulations. The regulations would provide that cable operators, in digital cable systems of 750 MHz or greater activated channel capacity, shall provision their systems to support the "plug and play" operation of "Unidirectional Digital Cable Products." Cable operators must support devices with the POD-Host Interface built to SCTE standards, supply compatible separate security "POD' modules to customers, and upon their request, HD set-top boxes with IEEE 1394 digital connectors. The proposed regulations also provide that products, including DTV receivers, that are labeled or marketed as able to connect directly to digital cable systems shall meet certain criteria. In particular, those HDTVs that bear the specified labels, or are otherwise marketed as "cable ready," "cable compatible," or as accepting a POD, or otherwise convey the impression that the device is fully compatible with digital cable service, must include "DVI/HDCP" or "HDMIIHDCF""secure digital connectors on a phased-in basis. The labeling/marketing regime would also ensure that manufacturers will self-certify their products under a test suite to be developed jointly by manufacturers and cable operators, which will include tests specifically aimed to prevent harm to the cable network. As part of the self-certification process, a manufacturer's first digital television product will be submitted for interoperability testing. A manufacturer's first non-television product will be submitted for testing with regard to harm to the network unless such manufacturer has previously completed testing for a digital television product.

Also enclosed is a joint regulatory recommendation related to copy protection issues, including "encoding rules." This recommendation provides for "encoding rules" modeled generally on those of Section 1201(k) of the Digital Millennium Copyright Act of 1998 ("DMCA") and the existing license for "DTCP" technology, including provisions for new business models, and that would apply to content delivered by all Multichannel Video Program Distributors ("MVPDs"), including cable. The rules include a ban on the use of "selectable output control" technology by all MVPDs, and the parties' agreement is contingent on FCC adoption of such rules. With the exception of unencrypted broadcast television, the proposed rules do not address down-resolution of programming. However, the lack of such a provision should not be construed as an indication that down-resolution should or should not be permitted, but rather that the Commission should resolve this issue.

We are also attaching, for informational purposes only, a patent license for the "DFAST" patent technology that ensures secure receipt of certain programming scrambled by local cable operators. Use of this technology in the "PODs" provided by the operators, and in the DTV receivers and other products made by consumer electronics manufacturers, is a key to "plug and play" compatibility on a nationally portable basis. The DFAST license is contingent upon implementation by the FCC of the attached regulatory recommendations, and the undertakings of the parties as described in the enclosed Memorandum of Understanding. We are not seeking any FCC action on the terms of this license.

This agreement is a comprehensive package, reflecting compromises by all of the parties, with the goal of each industry being to provide the American consumer with innovative and valuable digital products and services. As a result, our mutual support for this agreement rests on the recognition that all elements of it are essential. Our proposed regulations address a number of essential technical issues, and are complemented by our commitments with respect to testing, interoperability, the DFAST technology license agreement, labeling, and customer support. Therefore our mutual, private sector undertakings, described in the attached Memorandum of Understanding, are contingent on the adoption of FCC rules as described above.

Mr. Chairman, we applaud the leadership that you, the other Commissioners, and Congressional leaders have shown in guiding the many industries with a stake in the digital transition along a path to, as you put it, "bring the transition home." You have said that "pieces of the puzzle are starting to come together." We hope the agreement we present to you today will provide a critical piece for that puzzle and will hasten the day when all consumers can enjoy the benefits of the digital television world.

Sincerely,

Charter Communications, Inc.

By: _____
Carl E. Vogel
President and CEO

Comcast Cable Communications, Inc.

By: _____
Stephen B. Burke
President

Cox Communications, Inc.

By: _____
James O. Robbins
President and CEO

Time Warner Cable

By: _____
Glenn A. Britt'
Chairman and CEO

CSC Holdings, Inc.

By: _____
Thomas M. Rutledge
President

Insight Communications Company, L.P.

By: _____
Michael S. Willner
Vice Chairman and CEO

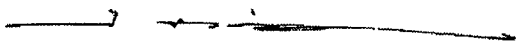
Cable One. Inc.

By _____
Thomas O Might
Presidenr and CEO

Advance/Newhouse Communications

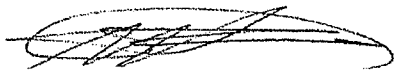
By: _____
Robert J. Miron
Chairman and CEO

Hitachi America, Ltd



By:_____
Name: Shigetaka Hikosaka
Title: Vice President and Deputy General Manager

JVC Americas Corp.



By:_____
Name: Shigeharu Tsuchitani
Title: Chairman, President, C.E.O.

Mitsubishi Digital Electronics America, Inc.

_____
Name: Robert A. Perry
Title: Vice-president, Marketing

Matsushita Electric Corp. of America (Panasonic)

_____
Name: Paul F. Liao
Title: Chief Technology Officer

Philips Consumer Electronics North America, a division of Philips Electronics North America Corporation

By:_____
Name: Thomas M. Hafner
Title: Vice President and General Counsel

Pioneer North America, Inc

_____
Name: Yuichiro Takayanaei
Title: Senior Vice President - Business Relations & Intellectual Property

Runco International, Inc.

By: _____
Name: Sam Runco
Title: CEO

Samsnng Electronics Corporation

By: _____
Name: Frank Romeo
Title: Director, DTV Business Development

Sharp Electronics Corporation

By: _____
Name: Rick B. Calacci
Title: Senior Vice President & Group General Manager, Consumer Electronics Group

Sony Electronics Inc.

By: _____
Name: Frank M. Lesher
Title: Executive Vice President, Law, External Affairs and Intellectual Property

Thomson

By: _____
Name: Dave Arland
Title: Director, Worldwide Public & Trade Relations, Consumer Products

Toshiha America Consumer Electronics, Inc.

By: _____
Name: Toru Uchiike
Title: President & C.E.O.

Yamaha Electronics Corporation, USA

By: _____
Name: Bart Greenberg
Title: National Sales Manager – Video Products

Zenith Electronics Corporation

By: _____
Name: John I. Taylor
Title: Corporate Vice President

cc: Commissioner Kathleen Q. Abernathy
Commissioner Michael J. Copps
Commissioner Kevin J. Martin
Commissioner Jonathan S. Adelstein
Susan Eid, Legal Advisor to Chairman Powell
Stacy Robinson, Legal Advisor to Commissioner Abernathy
Alexis Johns, Legal Advisor to Commissioner Copps
Catherine Bohigian, Legal Advisor to Commissioner Martin
Sarah Whitesell, Legal Advisor to Commissioner Adelstein
W. Kenneth Ferree, Chief, Media Bureau
Rick Chessen, Associate Bureau Chief, Media Bureau
Thomas Horan, Legal Advisor to Chief, Media Bureau
William Johnson, Deputy Chief, Media Bureau
Deborah Klein, Chief of Staff, Media Bureau
Mary Beth Murphy, Division Chief, Policy Division, Media Bureau
Steve Broeckhart, Deputy Chief, Policy Division, Media Bureau
John Wong, Division Chief, Engineering Division, Media Bureau
Michael Lance, Deputy Chief, Engineering Division, Media Bureau
Robert Pepper, Chief, Office of Plans and Policy
Amy Nathan, Senior Legal Counsel, Office of Plans and Policy
Jonathan Levy, Deputy Chief Economist, Office of Plans and Policy
Bruce Franca, Deputy Chief, Office of Engineering and Technology
Susan Mort, Attorney Advisor, Media Bureau
Marlene H. Dortch, Secretary (for inclusion in CS Docket No. 97-80 and PP Docket No. 00-67)
Hon. W.J. "Billy" Tauzin
Hon. Fred Upton
Hon. John D. Dingell
Hon. Edward J. Markey
Hon. John McCain
Hon. Ernest F. Hollings

Attachments:

Memorandum of Understanding
DFAST Technology License Agreement
Recommended Regulations to Ensure Compatibility
Recommended Regulations, Encoding Rules
February 2000 NCTA/CEA PSIP Agreement

December **12.2002**

Memorandum of Understanding Among Cable MSOs and Consumer Electronics Manufacturers

This Memorandum of Understanding sets forth the basic principles which are incorporated into final documentation for private sector undertakings, for submission to the FCC including recommendations to he used in a rulemaking process and, as necessary, for submission to Congress for appropriate implementation.

1. Executive Summary:

1.1. As the result of a series of meetings among the Parties (Cable Multiple System Operators ("MSOs"), Consumer Electronics Manufacturers ("CE Manufacturers") and the Consumer Electronics Association ("CEA")), facilitated by the National Cable & Telecommunications Association ("NCTA") and CEA, this Memorandum of Understanding ("MOU) has been reached which summarizes the framework for the set of documents to be submitted to the FCC including recommendations to be implemented as regulations and, as necessary, to Congress for appropriate implementation. Some of the elements of this understanding are private sector undertakings.

1.2. No conditions or obligations will be placed on the Parties except for those which are explicitly called for in this MOU.

1.3. This MOU constitutes a system that necessarily relies on all its parts to provide consumers with solutions to cable and CE issues affecting digital television. Should any part of this MOU not be implemented as proposed, or if additional obligations are imposed on a Party, each of the Parties reserves its right to withdraw support for any implementation.

1.4. This MOU primarily addresses -- and the final agreed-upon documentation primarily addresses -- "Unidirectional Digital Cable Products," i.e., unidirectional ("one-way") DTV products, although further discussions will be held to address "Advanced Interactive Digital Cable Products," i.e., interactive, "two-way," DTV products. These Unidirectional Digital Cable Products may be televisions, set-top-boxes, recording devices, and other devices without limitation.

1.5. The Parties agree to jointly submit and support consensus proposals arising out of this MOU for implementation by FCC regulations and, as necessary, for implementation by Congress through legislation. The Parties will endeavor vigorously to obtain the support (or non-opposition) of associations and other groups for this MOU. The Parties agree that other provisions of this MOU may be implemented by them without either FCC or Congressional involvement.

1.6. This MOU does not restrict or preclude private agreements between or among any of the Parties.

change method, and evaluation criteria for updating encoding rules, are described in the encoding rules proposal to the FCC that is part of this package.

2.4. The Parties are jointly submitting and supporting a proposal for consensus encoding rules (which is enclosed as part of this package) for implementation by FCC regulations and are jointly submitting and will support a proposal for consensus encoding rules, as necessary, for implementation by Congress through legislation, as detailed in Section 2.3.

2.5. The DFAST License Agreement contains provisions allowing for liability for the willful and bad faith failure to follow the compliance and robustness rules, however such liability will be limited to avoid "windfall" "piling on" legal actions, and maximum liability amounts are stated, and reasonable. An additional provision includes mechanisms to limit legal costs and attorneys' fees.

2.6. The DFAST License Agreement is to be royalty free, and will require a one-time license fee not to exceed $5,000 for administration costs.

2.7. The DFAST License Agreement does not restrict application of the POD Host Interface and technology to any product that meets its requirements. MSOs will not withhold or otherwise limit the availability of PODs to cable customers for any Unidirectional Digital Cable Product that meets the requirements of the DFAST License Agreement, with the exception that a POD technology may sunset as provided for in this MOU. CE Manufacturers, through confidential reports provided to and consolidated by CEA, agree to provide CEA with confidential production forecasts that will be aggregated by CEA and thereafter used by CableLabs to inform MSOs in advance of the number of POD enabled products entering the marketplace. CableLabs will provide the aggregate unit volume reports from CEA to MSOs for their planning. MSOs and CableLabs agree to keep this information confidential at all times. CE Manufacturers agree to provide such monthly forecasts for a rolling five-month period for five years from the month of self-certification of the first compliant product. This information will be provided so that MSOs can anticipate potential POD demand.

2.8. The DFAST License Agreement does not include within the License any requirement for testing or certification of compliance. The Parties have agreed to provisions for interoperability testing and certification which are addressed in Section 3.7 of this MOU.

2.9. The DFAST License Agreement contains a field-of-use restriction barring its implementation on Advanced Interactive (two-way) Digital Cable Products. This field-of-use restriction will remain in effect until December 31,2005, and thereafter unless appropriate regulations and legislation are then in effect that subject all MVPDs (including DBS), telephone and DSL providers, Internet and other competing technologies for the distribution of video to the same encoding rules (including rules applicable to the use of selectable output controls and down-resolution). It is further agreed that should a CE Manufacturer reach a separate DFAST License Agreement which eliminates this field-of-use restriction, such agreement will be open to any CE Manufacturer under the "Most Favored Nations" (MFN) clause, and any changes in such an agreement will also flow to CE Manufacturers who desire it under the same MFN

clause. If the Parties are unable to reach agreement on requirements for Advanced Interactive (two-way) Digital Cable Products by December 31,2005, then any Party may pursue independent solutions from the FCC and Congress.

3. Unidirectional Digital Cable *n* (n = TV, Tuner, etc) Product Definition (This is a one-way cable product)

3.1. The Parties will agree upon a recognized proposed primary term for the products addressed in this MOU. The Parties agree that application of this term to the product, packaging and related materials is voluntary, but the Parties are encouraged to use this name to promote consumer awareness.

3.2, The Parties will agree upon a recognized proposed supplementary term for the products defined below, which are additionally equipped with a secure digital interface (as specified in Section 3.6 below). The Parties agree that application of this term to the product, packaging and related materials is voluntary, but the Parties are encouraged to use this name to promote consumer awareness. When used, this term should be used in context with the primary term to avoid consumer confusion.

3.3 The Parties agree to not trademark either of the above terms, thus agreeing to not exercise any control over their application and use, or may agree to jointly trademark these terms without compensation and therefore ensure via license terms that these terms are only used to describe products defined herein. Should any Party already own a trademark or other legal right to the above terms, it agrees to drop all claims to such rights, provided that such Party consents to have the term in which it owns a trademark or other legal right used as the aforementioned term.

3.4 Cable Services Accessed (Minimum):

3. 1. Analog and Digital Services in-the-clear (including basic and tiered cable services)
3.4.2. Scrambled digital services via POD CA system (including basic, tiered and premium cable services)
3.4.3. Call-ahead pay-per-view (PPV) if supported by cable operator.
3.4.4. Channel Navigation using channel map and associated text label from cable network.
3.4.5. These products do not access video-on demand (VOD)
3.4.6. These products do not access impulse pay-per-view (IPPV).
3.4.7. These products do not utilize the return path of the cable system.
3.4.8. These products do not use MSO provisioned EPG program schedule information from the cable network. In this respect, MSO provisioned EPG program schedule information does not include PSIP data provided under the terms of the February 2000 NCTA/CEA PSIP agreement.
3.4.9. These products can receive PSIP data in-band pursuant to the terms of the February 2000 PSIP agreement.
3.4.10. Certain products (described in Section 3.6 below) will provide for an interface for connection to future advanced cable set-top-boxes and other products.

- With screen sizes 25 to 35 inches -- 50% of a manufacturer's models offered for sale effective July 1,2005; 100% of such models effective July 1, 2006.
- With screen sizes 13 to 24 inches – 100% of a manufacturer's models offered for sale effective July 1,2007.

- As to the above, screen sizes are to he measured diagonally across the picture viewing area. These screen sizes are stated in the dimensions applied to screen sizes with a traditional 4:3 aspect ratio. When applied to different aspect ratios, the applicable screen size is determined by the vertical measurement. For example, the requirements for a 13" screen size with a 4:3 aspect ratio apply to a DTV receiver with a 7.8" vertical measurement and a 16:9 aspect ratio.

3.6.2 MSO Commitments:

3.6.2.1 Under the recommended FCC regulations, the following will apply to MSOs. Effective July 1,2005, when provisioning HD set-top-boxes (STB), MSOs must include both DVI/HDMI with copy protection and IEEE 1394 with copy protection (including software support) as described in Section 3.8. Effective December 31, 2003, upon request of a customer, MSOs will replace any leased high definition set-top box, which does not include a functional IEEE 1394 interface, with one that includes a functional IEEE 1394 interface or upgrade the customer's set-top box by download or other means to ensure that the IEEE 1394 interface is functional. If the consumer has a HD STB with DVI, but not 1394, and does not want a box with a 1394 interface, the customer may retain his current STB. MSOs need not exchange a deployed STB unless the consumer wants one with a 1394 interface. MSOs will replace any deployed HD STB with a DVI connector with one with DVI and 1394.

3.6.2.2 With regard to the replacement of a deployed HD STB with DVI for one with DVI and 1394, the STB will be provided at no additional cost to customer if customer requests it. The MSO may charge, as appropriate, for delivery and installation of the new STB.

3.6.3 To allow for future flexibility, subject to joint approval of the Parties (and the FCC if, as proposed, the CE Manufacturers' obligation to include digital interfaces is embodied in regulation or legislation), future secure digital interfaces may be substituted for those detailed above.

3.6.4 CE Manufacturers shall provide in appropriate post-sale material that describes the features and functionality of the product, such as the owner's guide, the following language: "This digital television is capable of receiving basic analog, digital basic and digital premium cable television programming by direct connection to a cable system providing such programming. A security card provided by your cable operator is required to view encrypted digital programming. Certain advanced interactive digital cable services such as video-on-demand, cable operator enhanced program guide, and data enhanced television service may require the use of a set top

box. For more information contact your local cable operator." This notification information is to be made available in various product owner's guides and technical references. It is specifically agreed that CE Manufacturers need not provide retail or pre-sales consumer notification information and that such notification information need only be consumer post-sales in nature. CE Manufacturers will agree to an owner's guide index reference to "Digital Cable Compatibility," leading the consumer to the information in the owner's guide or technical reference material.

3.7. Interoperability Testing and Certification Requirements:

The Parties will jointly develop and mutually agree to a Test Suite for Unidirectional Digital Cable Product prototype testing by January 31,2003.

Each CE Manufacturer will bring a prototype of its first POD-enabled Unidirectional Digital Cable Television to CableLabs or to an appropriately qualified third-party test facility to execute the Test Suite. CE Manufacturers shall remedy all Critical Test failures and retest at CableLabs or an appropriately qualified third-party test facility. CE Manufacturers may independently determine how to remedy Non-critical Test failures and may remedy them without retesting of the product at CableLabs or an appropriately qualified third-party test facility. CE Manufacturers shall submit First Prototype Test Suite Results and Self-certification Documentation to CableLabs. For POD-enabled Unidirectional Digital Cable Televisions developed after the first model, CE Manufacturers will submit Self-certification Documentation to CableLabs.

If the CE Manufacturer's first model is not a Television, the CE Manufacturer will bring a prototype of said model to CableLabs or an appropriately qualified third-party test facility to execute the Test Suite. CE Manufacturers shall remedy all Harm Prevention Test failures and retest at CableLabs or an appropriately qualified third-party test facility. CE Manufacturers may independently determine how to remedy all other test failures and may remedy them without retesting of the product at CableLabs or an appropriately qualified third-party test facility. CE Manufacturers shall submit Harm Prevention Test Results and Self-certification Documentation to CableLabs.

After delivering Self-certification Documentation and First Prototype Test Suite Results for a first prototype Unidirectional Digital Cable Television, CE Manufacturers have no further obligation to test at CableLabs or third-party test facilities. It is envisioned that manufacturers will be issued POD technology secrets in bulk under logistics to be determined by the Parties, for both pre-production testing and mass production, and can begin applying these secrets to POD-enabled televisions upon issuance of the Self-Certification Documentation. The requirements for interoperability and self-certification have been developed and are part of the technical regulations recommended for FCC adoption. CE Manufacturers agree that all Unidirectional Digital Cable Products shall meet the interoperability and self-certification requirements set forth in such technical regulations (which are enclosed as part of this package), or CE Manufacturers will lose their right to receive keys for the non-compliant product. CE Manufacturers will, upon reasonable request and subject to a mutually agreeable non-disclosure agreement, provide summary reporting to CableLabs of the identification of Host IDs and secrets with particular POD unit assemblies and such additional information as will reasonably

4. Advanced Interactive Digital Cable *n* (n = TV, Tuner, etc) Product Definition (This is a two-way product)

Both MSOs and CE Manufacturers agree to continue to work together to create appropriate specifications, technical descriptions and labeling/information requirements for Advanced Interactive (two-way) Digital Cable Products.

4.1. The Parties will agree upon a recognized term for the advanced interactive digital cable products in summary form. The Parties will discuss whether there should be a requirement to mark product in any way with this name, but both MSOs and CE Manufacturers are encouraged to use this name to promote consumer awareness.

4.2. Interoperability Testing and Certification Requirements: Because of the complexity of this type of product, CE Manufacturers agree to a higher level of compliance, and of interoperability testing, leading to self-certification; CE Manufacturers will participate in prototype testing and development of interoperability test suites; further details subject to continued discussion.

4.3. Cable operators' EPG will be provided for advanced interactive digital cable products via OCAP or its successor technology.

The understandings set forth herein represent the understandings in principle of the Parties with respect to the matters specified therein. The Parties acknowledge that such understandings that have not been reduced to agreements submitted herewith will be set forth in further detail in subsequent documents to be negotiated by the Parties. It is understood that this MOU shall be construed only as a memorandum of understanding summarizing the discussions between the Parties.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:	)	
	)	
Implementation of Section 304 of the Telecommunications Act of 1996	)	CS Docket No. 97-80
	)	
	)	
Commercial Availability of Navigation Devices	)	
	)	
Compatibility Between Cable Systems and Consumer Electronics Equipment	)	PP Docket No. 00-67
	)	

REPLY COMMENTS OF THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

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April 28, 2003

APPENDIX 1

Recommended Regulations to Ensure Compatibility Between Digital Cable Systems and Unidirectional Digital Cable Products and to Provide for Appropriate Labeling of Such Products.

Subpart ___ -- Compatibility Between Digital Cable Systems and Unidirectional Digital Cable Products and Labeling.

§ __.___Support For Plug and Play Operation of Unidirectional Digital Cable Products On Digital Cable Systems.

(a) The requirements of this section shall apply to digital cable systems.

(b) No later than July 1, 2004, cable operators shall support Unidirectional Digital Cable Products, through the provisioning of PODs and services, as follows:

(1) Digital cable systems with an activated channel capacity of 750 MHz or greater shall comply with:

(i) SCTE 40 2001, as amended by DVS/535 (as of 10/29/02), provided however that with respect to Table B.11, the Phase Noise requirement shall be -86 dB/Hz, and also provided that the "transit delay for most distant customer" requirement in Table B.3 is not mandatory.

(ii) ANSI/SCTE 65 2002 (as of 10/29/02), provided however that the referenced Source Name Subtable shall be provided for Profiles 1, 2, and 3.

(iii) ANSI/SCTE 54 2002, as amended by DVS/435r4 (as of 10/29/02).

(iv) Without limiting the above requirements, cable operators shall also implement the terms of the Feb. 2000 NCTA/CEA PSIP agreement, attached as Appendix A.

(2) All digital cable systems shall comply with:

(i) ANSI/SCTE 28 2001, as amended by DVS/519r2 (as of 11/5/02).

(ii) ANSI/SCTE 41 2001, as amended by DVS/301r4 (as of 10/29/02).

(3) Cable operators shall ensure, as to all digital cable systems, an adequate supply of PODs that comply with the standards specified in Section (b)(2) to ensure convenient access to such PODs by customers. Without limiting the foregoing, cable operators may provide more advanced PODs (i.e., PODs that are based on successor standards to those specified in Section (b)(2)) to customers

Manufacturer shall submit Harm Prevention Test Results and Self-Certification Documentation to CableLabs.

(5) After delivering Self-Certification Documentation and First Prototype Test Suite Results for a first prototype Unidirectional Digital Cable Television, manufacturers have no further requirement to test at CableLabs or third-party test facilities.

(e) Manufacturers shall provide in appropriate post-sale material that describes the features and functionality of the product, such as the owner's guide, the following language: "This digital television is capable of receiving analog basic, digital basic and digital premium cable television programming by direct connection to a cable system providing such programming. A security card provided by your cable operator is required to view encrypted digital programming. Certain advanced and interactive digital cable services such as video-on-demand, a cable operator's enhanced program guide and data-enhanced television services may require the use of a set-top box. For more information call your local cable operator."

(f) The Commission will review the standards in this Section on a biennial basis to determine whether any of the regulations adopted herein shall sunset and/or be amended in light of changes in technology or other public interest factors.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:	)	
	)	
Implementation of Section 304 of the Telecommunications Act of 1996	)	CS Docket No. 97-80
	)	
	)	
Commercial Availability of Navigation Devices	)	
	)	
Compatibility Between Cable Systems and Consumer Electronics Equipment	)	PP Docket No. 00-67
	)	

COMMENTS OF THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

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March 28, 2003

Before the
Federal Communications Commission
Washington, D.C. 20554

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Implementation of Section 304 of the Telecommunications Act of 1996	)	CS Docket No. 97-80
	)	
	)	
Commercial Availability of Navigation Devices	)	
	)	
Compatibility Between Cable Systems and Consumer Electronics Equipment	)	PP Docket No. 00-67
	)	

COMMENTS OF THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

The National Cable & Telecommunications Association ("NCTA") hereby submits its comments in support of the Agreement on cable-consumer electronics compatibility reached by cable operators and television set manufacturers. In particular, we support prompt Commission action on the proposed FCC rules which the parties to the Agreement recommend for Commission adoption.

NCTA is the principal trade association of the cable television industry, representing operators serving over 90 percent of the nation's cable customers. These companies also provide high-speed access to the Internet and other services. NCTA's members also include more than 200 cable program networks, as well as companies that provide equipment and services to the industry.

INTRODUCTION AND SUMMARY

On December 19, 2002, eight cable companies representing more than 75% of cable subscribers in the United States, and fourteen consumer electronics ("CE") manufacturers, representing the majority of HDTV sales in the United States ("the Signatories" or the "Parties"),

submitted a landmark agreement on cable-CE compatibility and related issues to the Commission. That MSO-CE Agreement (the "Agreement"), which was facilitated by NCTA and the Consumer Electronics Association ("CEA"), consists of a package of provisions which include (1) voluntary commitments by the Signatories, and (2) proposals for rules to be adopted by the Commission that, once adopted, would resolve other issues. The Commission promptly put out for comment the rules proposed in the Agreement and, by these comments, NCTA explains why adoption of those rules would be in the public interest and urges expeditious Commission action on them.

As the Signatories said in announcing the Agreement, it benefits consumers because it will ensure that the next generation of digital television sets will receive one-way cable services without the need for set-top converter boxes; enable consumers with HDTV sets to receive HDTV signals with full image quality and easily record digital content; allow for an array of new devices easily to be connected to the new HDTV sets; permit access to cable's two-way services through digital connectors on high-definition digital TV sets; encourage manufacturers to speed the production of new sets and services for delivery to the market; and ensure that digital cable services will remain easy to access and use by consumers.

The Agreement will encourage the development and distribution of high-quality digital content. A key element of the Agreement relates to secure digital interfaces that protect consumers' home recording capabilities along with copyright owners' rights to secure their digital content. Cable operators have agreed to support recordable IEEE 1394 connections on high-definition set-top boxes. In turn, digital TV manufacturers have agreed to support FCC labeling regulations that specify Digital Visual Interface (DVI)/High-bandwidth Digital Content Protection (HDCP) (or HDMI/HDCP when available) display interfaces with copy protection

controls in future "cable ready" HDTV products. Moreover, the Agreement establishes "rules of the road" on home recording capabilities and proposes copy protection rules for digital content which are based on existing law and studio-CE agreements and which are applicable to all Multichannel Video Programming Distributors ("MVPDs").

We appreciate the Commission's efforts in putting the Agreement's proposed rules out for comment promptly and we hope final Commission action can similarly be taken in an expeditious manner. As detailed herein, this Agreement, reached by industries that have had serious disagreements, is good for both industries and, most important, good for the consumer. It will spur the digital transition and it demonstrates that other industries can and should voluntarily work together to fulfill the goals of the digital TV transition.

The Agreement creates a path for rapid development of the next generation of digital TV products and relieves CE manufacturers of their concerns about delay in the process. It creates a strong presence for cable operators at consumer electronics retailers like Circuit City and Best Buy, spurring competition with DBS at the point of sale which can only benefit consumers. It standardizes and streamlines technology that enables devices to interoperate and allows those devices to be used by consumers on digital cable systems throughout the country. And it establishes a voluntary inter-industry process going forward to establish technical specifications for interactive digital devices. In addition, it establishes digital tools and guarantees to provide digital programming for home viewing and copying.

Finally, as for the one major issue put out for comment that was not addressed in the Agreement – down-resolution of high-value digital content delivered over component analog outputs – the cable industry's primary interest is that any method used to close the "analog hole" should not put cable operators at a competitive disadvantage and should result in as much high

value content being made available to *all* MVPDs – and thus to their customers – as possible, consistent with the legitimate concerns of content providers. In this regard, NCTA is participating in the Analog Reconversion Discussion Group ("ARDG") under the auspices of the Copy Protection Technical Working Group ("CPTWG") to address the issue. Several different approaches, including watermarking technologies, CGMS/A, MPEG-21 (Moving Picture Experts Group), Multimedia Framework and Macrovision are being investigated by this group.

In this proceeding, to ensure competitive parity, the Parties have requested that the FCC apply its encoding rules – including whatever down-resolution rules it may adopt – to all MVPDs within its jurisdiction. As for the merits of down-resolution, the critical question to be answered is whether the consumer will have more – or fewer – choices of high-value digital content should down-resolution be prohibited, mandated or permitted. *If the FCC determines, as a number of content providers have suggested, that permitting down-resolution of high-value digital content delivered over analog outputs is the only means of assuring that such content will be made available to MVPDs and thus to consumers, NCTA supports adoption of rules achieving that result.*

I. THE AGREEMENT AND ACTION REQUESTED BY THE COMMISSION

A. The MSO-CE Agreement

As noted above, the Agreement between cable MSOs and consumer electronics manufacturers – facilitated by NCTA and CEA – consists of (1) a set of private industry agreements and (2) joint proposals for certain government rules. As the Signatories said in their letter transmitting the Agreement to the Commission: "When implemented, this agreement will provide the certainty the cable and CE industries need to build products and develop services to spur the digital transition, while preserving the ability of both industries to create innovative

products and services on a timely basis in the rapidly-changing digital environment." As a result of the Agreement, consumers will be able to buy digital TVs (DTVs) that connect to digital cable without a set-top box, and enjoy easy access to high-definition television services offered by cable operators. As the Parties said in their joint press release announcing the Agreement, it "sets the stage for a national 'plug-and-play' standard between digital television products and digital cable systems, will help speed the transition from analog to digital television and establish much-needed marketplace, technical, and regulatory certainty for the cable and consumer electronics (CE) industries."

Specifically, the joint recommendations to the FCC include: (1) a set of technical standards for cable systems and "cable-ready" (or the equivalent) DTV products (and testing procedures to assure compatibility); (2) a proposed regulatory framework for support of digital TV receivers, digital recorders, and other digital devices with secure interfaces on cable systems; and (3) "encoding rules" applicable to all MVPDs to help to resolve pending concerns about home recording and viewing. In addition, the Parties have agreed upon a security technology license to ensure that high-value content can be transferred securely in the home network by consumers. No FCC action is requested or required with respect to that license.

In particular, the Agreement addresses the following critical issues:

Effect on TV Products

- The Agreement allows set-top box functionality to be built into "one way" digital TV sets and other products (such as digital video recorders) so that they may receive scrambled premium programming without a cable box.

- A separate security card (know as a "Point-of-Deployment" or "POD" module which is similar to a smart card) supplied by the cable operator plugs into the DTV (or other device) to enable receipt of scrambled services.

- A set-top box is needed to access advanced interactive digital cable services such as video-on-demand or a cable operator's enhanced program guide. (The Parties are

continuing discussions concerning DTV sets and other devices that can receive cable's advanced, two-way services without a cable box.)

- The Agreement addresses the need for DTV sets and set-top boxes to have secure digital connectors to permit copy-protected display and recording of high-value digital content. These digital connectors will "future-proof" the HDTV set so that advanced interactive services of a cable system can be delivered to the one-way HDTV set through connection to a set-top box.

- In particular, CE manufacturers will add the secure digital DVI/HDCP digital connector to POD-equipped high-definition DTV sets on an agreed-upon schedule. As of December 31, 2003, upon consumer request, MSOs will provide their customers with a high-definition set-top box with both a DVI connector and a secure1394/5C digital connector, to support DTV sets and home recorders which have only the 1394 digital connector. As of July 1, 2005, MSOs will include both a DVI or HDMI connector and a 1394/5C connector on all high definition set-top boxes acquired for distribution to customers.

Home Recording Issues

- Devices built to the proposed standards must recognize and respect the copy-control signals needed to protect high-value digital content as such content passes through the digital connectors.

- The Parties propose that the FCC adopt a set of "encoding rules" (consumer home recording capabilities) that apply to all MVPDs (such as cable and DBS). The rules are modeled on standards previously adopted by Congress and used in private licensing agreements between studios and consumer electronics companies. The Parties also agree to jointly request that Congress apply such rules to Internet delivery systems, DSL and similar competitive technologies. These rules provide that:

    - Subscribers may make at least one copy for their private and personal use of any digital program sold by monthly subscription.

    - Programs sold by the one (PPV, VOD and SVOD) may be marked as copy never, but cable subscribers may pause or store them (on PVRs) for 90 minutes (or longer, if agreed to by the program provider).

    - These devices may not permit content to flow only through a particular type of output. (This prohibition on "selectable output controls" will be effective when the FCC makes the restriction applicable to all MVPDs.)

    - Free over-the-air broadcast signals may be copied freely, and may not be reduced in resolution ("down-res'd") when output from unprotected high-definition analog ports.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
National Cable & Telecommunications	)	CSR- _____
Association's Request for Waiver of	)	
47 C.F.R. § 76.1204(a)(1)	)	

REQUEST FOR WAIVER

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August 16, 2006

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
National Cable & Telecommunications	)	CSR- _____
Association's Request for Waiver of	)	
47 C.F.R. § 76.1204(a)(1)	)	

To: Chief, Media Bureau

REQUEST FOR WAIVER

The National Cable & Telecommunications Association ("NCTA"), the principal trade association for the U.S. cable industry representing cable operators serving more than 90 percent of the nation's cable television households, respectfully requests that the Commission waive the "integration ban" requirement set forth in the second sentence of Section 76.1204(a)(1) of its rules for all cable operators until their deployment of downloadable security or December 31, 2009, whichever is earlier. Verizon has asked for similar relief, although its request was for an unlimited time.[1]

The integration ban currently provides that, effective July 1, 2007, certain Multichannel Video Programming Distributors ("MVPDs") may no longer place in service set-top boxes and other "navigation devices" that combine conditional access and other functions in a single

[1] *See* Verizon's Petition for Waiver of the Set-Top Box Integration Ban, 47 C.F.R. § 76.1204(a)(1) (filed July 11, 2006) ("Verizon Waiver Request"). In its request, Verizon asks for a waiver of the integration ban until its version of a downloadable security can be implemented. Should the Commission grant the Verizon waiver, under both the statute and the Commission's rules, that waiver would also apply to "all service providers and products in the category in which the waiver is granted," including, of course, the cable operators for whom this request is being filed. *See* 47 U.S.C. § 549(c); 47 C.F.R. § 76.1207.

As detailed below, NCTA meets the requirements of this waiver provision.

A. The Requested Waiver Is Necessary To Assist the Development and Consumer Adoption of New and Improved Digital Services

The requested waiver is necessary to promote consumer access to new and improved digital cable programming and services through more equipment options at lower costs. Digital cable delivers numerous value-added services to consumers, including high-definition ("HD") programming,[39] advanced services such as video-on-demand ("VOD"), powerful digital parental control technologies,[40] interactive program guides, and other interactive content.[41] Digital cable customers can also subscribe to a number of programming packages suited to their individual tastes, ranging from sports and movies to Spanish-language and numerous ethnic packages.[42]

In addition, grant of the waiver will help accelerate the cable industry's migration to digital networks. At the end of 2005, cable operators served 28.5 million digital cable

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[39] *See* Comments of NCTA, MB Docket No. 05-255, at 27 (Sept. 19, 2005) ("NCTA Video Competition Comments") (noting that there are 23 HD cable networks that transmit much of their programming in high definition). Furthermore, since January 2003, cable has more than doubled the number of homes passed by HDTV service, and it is now available to 96 million U.S. TV households. *See* NCTA, *2006 Industry Overview*, at 17 (Mar. 27, 2006) ("2006 Industry Overview"), *available at* http://i.ncta.com/ncta_com/PDFs/NCTAAnnual%20Report4-06FINAL.pdf.

[40] *See* 2006 Industry Overview at 20 (noting the cable industry's leadership in providing parental control technologies and educating consumers about their availability); *see also* Comcast Waiver Request at 11 (noting that "Comcast's digital set-top boxes provide an easy user interface for parents to limit the programming the family watches, including the ability to block program by title, by TV or MPAA ratings, by channel, and (for many systems) by time of day").

[41] VOD has been enormously popular with digital cable customers. For example, Time Warner Cable delivered about 73 million VOD streams in December 2005, up nearly 42 percent from December 2004, and Comcast delivered about 127 million VOD streams in February 2006, up from 87 million a year earlier. *See* George Winslow, *VOD Scorecard*, MULTICHANNEL NEWS, May 1, 2006. Likewise, Cablevision makes available about 1,200 hours of pay and subscription VOD programming each month, and Cox makes available over 1,300 hours of VOD programming. *See id.*

[42] *See, e.g.*, Comcast Waiver Request at 11 (citing examples of digital programming); *Cox Digital Cable, available at* http://www.cox.com/digitalcable/default.asp (describing digital cable offerings). Of course, subscribers using digital set-top boxes can enjoy digital picture quality, as well.

customers, or 43.6 percent of total cable subscribers.[43] Operators are seeking to boost digital penetration levels significantly over the next few years.[44] Over time, as more digital set-top boxes are deployed and the number of digital subscribers increases, cable operators will have the ability to reclaim analog spectrum for HD and VOD, as well as faster Internet access and other innovative services.[45] The Commission has noted this public interest benefit, observing that the availability of low-cost integrated set-top boxes would "further the cable industry's migration to all-digital networks, thereby freeing up spectrum and increasing service offerings such as high-definition television."[46] In sum, with increased digital penetration and accelerated migration to digital networks, cable operators will be able to provide more and better digital services to consumers to compete with DBS, telephone company and other all-digital MVPD platforms.[47]

But the looming integration ban deadline and the enormous costs of the ban to cable operators and consumers – $500 million per year – threaten these objectives. *First*, one of the cable industry's largest set-top box vendors recently informed cable operators that it has been forced to suspend further development of innovative and competitive new features for digital set-top boxes to devote more of its limited technical and human resources to the re-engineering

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[43] *See* 2006 Industry Overview at 5-6.

[44] Comcast, for example, has indicated that it is pushing for digital penetration of over 75 percent by the end of the decade. *See* Comcast Waiver Request at 10; *see also* Time Warner News Release, *Time Warner Inc. Reports First Quarter 2006 Results*, at 4 (May 3, 2006) (noting that digital penetration reached 51 percent at the end of the first quarter of 2006).

[45] *See Second Report and Order,* ¶ 37 (noting that transitioning to an all-digital platform will enable cable operators to "free[] up spectrum and increas[e] service offerings such as high-definition television").

[46] *See Second Report and Order,* 20 FCC Rcd. at 6813, ¶ 37.

[47] The Commission has underscored the benefits of such increased competition to consumers, including "increased choice, better services, higher quality, and greater technological innovation." *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eleventh Annual Report, 20 FCC Rcd. 2755, 2757 ¶ 4 (2005); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Tenth Annual Report, 19 FCC Rcd. 1606, 1608-09 ¶ 4 (2004) (same).